(1)

No. 06-

IN THE

Supreme Court of the United States

JTEKT CORPORATION (F/K/A/ KOYO SEIKO COMPANY, LTD.), KOYO CORPORATION OF U.S.A., NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., AND NTN-BOWER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court is required to remand an administrative decision to an agency, when the agency decision under review was based on a policy that the agency has since reversed or modified in a highly analogous context; and

2. Whether a federal court is required to remand an administrative decision to an agency, when the agency action has been found to violate the United States' treaty obligations and the agency is the only body statutorily authorized to consider whether and how to implement the treaty.

PARTIES TO THE PROCEEDING

Petitioner Koyo Corporation of U.S.A. is a wholly-owned subsidiary of Petitioner Koyo Seiko Co., Ltd., which is now known as JTEKT Corporation. JTEKT Corporation is a publicly-owned company with shares listed on the Tokyo Stock Exchange. Toyota Motor Corporation, a publicly-owned company with shares listed on the Tokyo, New York, and London Stock Exchanges, owns more than 10% of the shares of JTEKT Corporation.

Petitioners NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-Bower Corporation are wholly-owned subsidiaries of NTN USA Corporation, which is a wholly-owned subsidiary of Petitioner NTN Corporation, a publicly-owned company with shares listed on the Tokyo Stock Exchange.

Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Koyo Seiko Company, Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"),[1] and NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-Bower Corporation (collectively "NTN") respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals is available at 210 F. App'x 992 (Fed. Cir. 2006), Pet. App. 1a-2a. The order of the court of appeals denying the petition for rehearing is unreported, but is available at 2007 U.S. App. LEXIS 4456 (Fed. Cir. Feb. 6, 2007), Pet. App. 50a-51a.

The opinion of the United States Court of International Trade is reported at 341 F. Supp. 2d 1334 (Ct. Int'l Trade 2004), Pet. App. 3a-33a.

The final determination of the United States Department of Commerce in the underlying administrative review is reported at 66 Fed. Reg. 36,551 (July 12, 2001), Pet. App. 34a-49a.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2006. On February 6, 2007, the court of appeals entered an order denying Petitioners' timely motion for rehearing. On May 7, 2007, the Chief Justice granted Petitioners' application to extend the time for filing this Petition for a Writ of Certiorari to and including June 6, 2007.

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[1] On January 1, 2006, after the initiation of the underlying legal proceedings, Koyo Seiko Company, Ltd. changed its name to "JTEKT Corporation."

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Tariff Act of 1930 provides, in relevant part:

> If—
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

19 U.S.C. § 1673.

The Tariff Act, as amended, further provides that "[t]he term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," and "[t]he term 'weighted average dumping margin' is the percentage determined by dividing the aggregate dumping margins determined for a

specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(A)-(B).

Finally, the Tariff Act, as amended, provides that "[i]n determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a).

STATEMENT OF THE CASE

This case presents two significant issues: (1) a circuit split between the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Federal Circuit on whether an agency's decision to change an administrative rule under which it previously rendered a decision adverse to a party requires a federal court on appeal to remand the case to the agency; and (2) whether a federal court must remand such a case to the agency when the change in rule is dictated by international treaty obligations, consistent with the constitutional separation of powers.

The Federal Circuit effectively answered both questions in the negative and refused to consider remanding this case, despite the fact that Petitioners were held liable by the United States Department of Commerce ("Commerce") for "dumping" under a policy that Commerce has since announced it will abandon. Commerce's change in policy was prompted by a decision of the World Trade Organization ("WTO"), holding that the procedure Commerce applied in this and other cases violates the United States' treaty obligations. The Federal Circuit's refusal to remand this case creates an unnecessary conflict with longstanding precedent of the D.C. Circuit, and an unwarranted schism in the law governing federal agencies, and violates important separation of powers principles by creating an obstacle to the Executive

Branch's ability to discharge the nation's treaty obligations. A writ of certiorari is required to correct the Federal Circuit's error, resolve the conflict between the courts of appeals, and restore the Constitution's balance in the field of foreign affairs.

A. Antidumping Proceedings.

Koyo and NTN are producers of various kinds of automobile parts and antifriction bearings, with facilities in Japan, the United States, and elsewhere around the world. In 1988, at the request of a domestic producer of antifriction bearings, Commerce and the United States International Trade Commission ("Commission") instituted an "antidumping" investigation of antifriction bearings imported from various countries, including Japan.[2] In an antidumping investigation, the Commission examines whether or not an industry in the United States is materially injured, or threatened with material injury, by reason of imports of merchandise. 19 U.S.C. § 1673(2). Simultaneously, Commerce investigates whether or not the merchandise is being sold, or is likely to be sold, in the United States at less than its fair value. *Id.* § 1673(1). If the final determinations of both agencies are affirmative, Commerce may (pursuant to the Tariff Act of 1930) impose upon the merchandise an antidumping "duty" equal to the amount by which the "normal value" of the merchandise (*i.e.*, the statutorily-adjusted price of the product in Japan) exceeds the statutorily-adjusted price of the product in the United States. *Id.* § 1673. This amount is known as the "dumping margin." *Id.* § 1677(35).

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[2] "Dumping" is a form of international price discrimination whereby an exporter sells its merchandise in the country of importation at prices lower than those at which it sells the same goods in its home market. *See* Jacob Viner, *Dumping: A Problem in International Trade* 4-5 (Augustus M. Kelley 1996) (1922).

Once an initial investigation is complete and an antidumping order has been issued, tentative dumping liability is established. Interested parties may, however, request an "administrative review" of the duty in each year following Commerce's initial investigation and order. *Id.* § 1675(a). The purpose of this annual review is to recalculate the antidumping margins for individual importers and assess the importer's actual dumping liability for the year. Thus, "administrative reviews" are distinct from initial "investigations," although the two administrative procedures are closely analogous.

Commerce issued an antidumping duty order on antifriction bearings from various countries, including Japan, on May 15, 1989. Since the imposition of the order, annual administrative reviews of the antidumping order have been requested with respect to the sales of both Koyo and NTN. This case results from the eleventh such annual review, covering the period May 1, 1999 to April 30, 2000.[3]

B. The Anti-Dumping Agreement And Uruguay Round Agreements Act.

In 1994, the United States signed and ratified the Uruguay Round Agreements, which established the WTO and required all Members to conform their antidumping practices to the terms of the treaty. See *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Marrakesh Agreement Establishing the WTO, Annex 1A (Apr. 15, 1994) ("Anti-Dumping Agreement").[4] In calculating antidumping duties, Article 2.4 of the Anti-Dumping Agreement requires that

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[3] *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom*, 66 Fed. Reg. 36,551 (July 12, 2001) (Final Admin. Review), Pet. App. 34a-49a.

[4] *Reprinted in* H.R. Doc. No. 103-316, vol. I, at 1453-77 (1994).

> *[a] fair comparison shall be made between the export price and the normal value.* This comparison shall be made at the same level of trade, normally at the exfactory level, and in respect of sales made at as nearly as possible the same time.

Id. art. 2.4 (emphasis added.) Congress incorporated this requirement into U.S. law in the Uruguay Round Agreements Act of 1994 ("URAA"), Pub. L. No. 103-465, § 224, 108 Stat. 4809, 4878 (codified at 19 U.S.C. § 1677b(a)).

C. Commerce's "Zeroing" Practice.

In the administrative review at issue in this case, Commerce applied a rule known as "zeroing" when calculating Petitioners' dumping margins. When an importer sells merchandise in the country of importation at a price that is above the normal value, it results in a "negative dumping margin," which (as the WTO has held) should be included in the calculation to offset any "positive dumping margins" (*i.e.*, the margins generated by sales in the country of importation at prices below the normal value) when determining the weighted average dumping margin for that importer. Commerce, however, converts any negative dumping margins to zero when determining the importer's weighted average dumping margin, while accounting fully for any positive dumping margins. In this way, zeroing negates the benefit to importers from the fact that some of their sales in the United States (the country of importation) are at prices above the normal value.

This calculation methodology, therefore, artificially inflates the weighted average dumping margin, and can result in a positive weighted average margin even though the negative margins are equal to or greater than the positive margins.[5]

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[5] As a simple example, assume that only two U.S. sales of the subject merchandise occurred during the relevant period, one with a U.S. price, after adjustment, of $600, and the other with a U.S. price of $400. Assume further that the normal value in each case is $500. Thus, the first

Essentially, Commerce puts a heavy thumb on the scale in favor of finding the existence of, and inflating the amount of liability for, dumping. Indeed, "[b]y zeroing negative margins Commerce [would] find that some dumping occurred if *any* U.S. sales were made below the average [normal value,] even if the vast majority of sales made by the subject foreign producers in the United States were at prices higher than the average [normal value]." *Bowe Passat Reinigungs- und Waschereitechnik GmbH* v. *United States*, 926 F. Supp. 1138, 1149-50 (Ct. Int'l Trade 1996) (emphasis added) (internal quotation marks omitted).

In the investigation phase and in each of the annual reviews of its order, including the annual review at issue, Commerce has used zeroing to calculate the antidumping duty margins for Koyo and NTN. In this review, Commerce calculated, using zeroing, weighted-average dumping margins for Koyo of 10.10% for ball bearings, 5.27% for cylindrical roller bearings, and 0.00% for spherical plain bearings; and weighted-average dumping margins for NTN of 9.16% for

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transaction has a dumping margin of -$100, and the second has a dumping margin of $100. Under the Department's zeroing practice, the -$100 would be converted to zero, and the weighted average dumping margin would be calculated as follows:

$$\frac{0 + \$100}{\$600 + \$400} = 10 \text{ percent}$$

If the full effect of the negative dumping margin transaction were considered, however, the weighted average dumping margin would be:

$$\frac{-\$100 + \$100}{\$600 + \$400} = 0 \text{ percent}$$

The result of the Department's practice was to impose a 10% antidumping duty on all of the company's imports of the subject merchandise into the United States, rather than the mathematically correct duty-free treatment those imports should have received.

ball bearings,[6] 16.26% for cylindrical roller bearings, and 3.60% for spherical plain bearings.

Both Koyo and NTN challenged Commerce's use of zeroing in their administrative briefs before the agency during the course of the review, and explained that if their negative margins were properly included in the calculation of their weighted average margins, those margins would be negative. In other words, but for Commerce's use of the zeroing practice, neither Petitioner would have been liable for dumping in this annual review, and they would be entitled to a refund of their cash deposits, which accumulated in the millions of dollars.

D. The WTO Has Found That Commerce's Zeroing Practice Violates The United States' International Obligations, And Commerce Has Agreed Fully To Implement This Determination.

Petitioners appealed Commerce's antidumping determination in its eleventh administrative review to the Court of International Trade, which held that Commerce's use of the zeroing methodology was a permissible interpretation of the antidumping statute. Pet. App. 20a-21a. Petitioners appealed to the Federal Circuit, which affirmed the Court of International Trade's decision without opinion. See *id.* at 1a-2a.[7]

After the court of appeals' decision, but before the Federal Circuit issued its mandate, the Department of Commerce announced that it would not use zeroing in any pending or future dumping investigation. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin*

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[6] This margin was later revised to 8.98% for reasons unrelated to this Petition.

[7] The Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade governing Commerce decisions under the antidumping statute. *See* 28 U.S.C. § 1295(a)(5).

During an Antidumping Investigation, 71 Fed. Reg. 77,722, 77,725 (Dec. 27, 2006) , *amended by* 72 Fed. Reg. 3783 (Jan. 26, 2007).[8] Commerce's change in policy was prompted by an earlier WTO decision (in a case brought against the United States by the European Community) that zeroing violates the treaty when used in initial investigations. See Appellate Body Report, *United States – Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")* ¶ 263, WT/DS294/AB/R (Apr. 18, 2006).

Before the Federal Circuit issued its mandate, the WTO Appellate Body also issued another decision that covered, *inter alia,* this very case, holding that Commerce's zeroing practice did not ensure a "fair comparison" as required by the Anti-Dumping Agreement and thus violated the United States' treaty obligations when used in *either* initial investigations or annual administrative reviews. See Appellate Body Report, *United States – Measures Related to Zeroing and Sunset Reviews* ¶¶ 138, 166, 176, WT/DS322/AB/R (Jan. 9, 2007) (hereinafter "*U.S. – Zeroing (Japan)*"), Pet. App. 53a-54a.[9] The WTO Dispute Settlement Body adopted the Appellate Body's report as the final action of the WTO on January 23, 2007. See Action by the Dispute Settlement Body, *United States – Measures Relating to*

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[8] Commerce stated that this change in rule would become effective on January 16, 2007. It later extended this date to February 22, 2007. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 72 Fed. Reg. 3783 (Jan. 26, 2007).

[9] The WTO's decision was issued in response to a complaint brought against the United States by Japan, which included the application of zeroing to Petitioners in the annual review at issue here. *See* Request for Consultations by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/1 (Nov. 29, 2004).

Zeroing and Sunset Reviews, WT/DW322/15 (Jan. 30, 2007).[10]

In light of the Department of Commerce's change in the rule governing investigations, and the WTO's determination that zeroing likewise violates the United States' treaty obligations when employed in administrative reviews, *including the very review that is the subject of this appeal*, Petitioners jointly requested rehearing by the Federal Circuit and a stay of the mandate for the purpose of seeking a remand of this case to the agency for further consideration. The Federal Circuit inexplicably refused. See Pet. App. 51a.

On February 20, 2007, the United States formally announced, as expected, that it would comply fully with its treaty obligations in light of the WTO's decision in *U.S. – Zeroing (Japan)*, which extends to the administrative review that is the subject of this appeal. See Dispute Settlement Body, *Minutes of the Meeting* ¶ 34, WT/DSB/M/226 (Mar. 26, 2007) (hereinafter "*Minutes*"), Pet. App. 58a; Statement of David P. Shark, U.S. Deputy Chief of Mission, WTO (Feb. 20, 2007), *available at* http://www.usmission.ch/Press2007/0220DSB.html (hereinafter "Statement of David P. Shark"). The United States has committed to Japan that it will fully implement the Appellate Body's decision by December 24, 2007. See Agreement on Reasonable Period of Time, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/20 (May 8, 2007) (hereinafter "*Agreement*"), Pet. App. 59a-60a. The United States cannot fulfill its diplomatic commitments regarding this administrative review, however, unless the case is remanded to the Department of Commerce to allow the agency to decide how to implement the WTO's decision. The Federal Circuit inexplicably refused to follow this perfectly reasonable course.

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[10] The WTO maintains a complete electronic collection of the documents filed in this case, available at http://www.wto.org/english/tratop_e/ dispu_e/cases_e/ds322_e.htm.

REASONS FOR GRANTING THE PETITION

This petition presents an exceptionally important issue that exposes a conflict between the Federal Circuit and the United States Court of Appeals for the District of Columbia Circuit in the law governing federal agencies, and concerns a serious (and unnecessary) judicially created obstacle to the executive branch's ability to implement the United States' treaty obligations. A writ of certiorari is warranted to harmonize the courts of appeals' rules and preserve the constitutional separation of powers.

First, the decision below is inconsistent with longstanding law in the D.C. Circuit and precedents of this Court. As explained, the Department of Commerce found Koyo and NTN liable for dumping based on its "zeroing" rule—a decision Commerce renewed in the annual administrative review on which Petitioners' appeal is based. While this case was still before the Federal Circuit, the WTO held that the use of zeroing violates the United States' treaty obligations, particularly in this case. Commerce is charged with ensuring U.S. compliance with those treaty obligations and has previously responded to adverse WTO rulings on the subject of zeroing by announcing that it will comply with the WTO decision and stop using zeroing. In the D.C. Circuit, this situation would result in a remand to allow the agency to reconsider its decision in light of the changed rule. The Federal Circuit, however, has followed a contrary rule in this and other cases. This creates an intolerable conflict in the law governing federal agencies that should be resolved by this Court.

Second, the decision below creates a serious and wholly unnecessary obstacle to the Executive Branch's ability to discharge the nation's treaty obligations, and thus violates the constitutionally mandated separation of powers. Congress has placed responsibility for implementing WTO decisions squarely in the hands of the Executive Branch. The United

States has given the WTO and its treaty partners specific assurances that it will implement the WTO's rejection of zeroing in all cases (including *this specific case*), and has assured the WTO generally that the Department of Commerce (and not the courts) will decide whether to reopen completed investigations in light of subsequent rule changes. The Federal Circuit's refusal to remand antidumping cases to the agency for reconsideration in light of the demise of the zeroing procedure is flatly inconsistent with the nation's treaty obligations, and makes hollow the Executive Branch's diplomatic assurances that the United States will implement and comply with the WTO agreements in this and other cases. The Federal Circuit's decision below thus frustrates the Executive Branch's ability to conduct the foreign affairs of the United States. This unwarranted violation of separation of powers principles requires this Court's intervention. Indeed, if this Court does not correct the Federal Circuit's erroneous decision below, Petitioners will be left without a remedy for the treaty violations the WTO has identified in this case, because the Executive Branch will be unable to provide the remedy it has promised.

I. THE DECISION BELOW IS CONTRARY TO PRECEDENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND PERPETUATES AN UNWARRANTED CONFLICT IN THE LAW GOVERNING JUDICIAL REVIEW OF FEDERAL AGENCIES.

The D.C. Circuit—which like the Federal Circuit has statutory responsibility for reviewing many agency actions—has long held that a court reviewing an agency decision must remand the case to the agency when the agency has announced a change in its governing regulations or policies during the pendency of the appeal. In *Panhandle Eastern Pipe Line Co.* v. *FERC*, 890 F.2d 435 (D.C. Cir. 1989), for example, the Federal Energy Regulatory Commission denied

certain tariff sheets proposed by a natural gas pipeline company on grounds that the method of apportioning transportation entitlements was not allowed by FERC policy. While the appeal was pending, the FERC announced a change in policy that would allow the apportionment. The court of appeals held that the agency's announcement required it to remand the case to the agency. As the court explained,

> Such a disposition represents the intersection of two well-established doctrines. The first holds that an appellate court must consider the law in effect at the time it renders its decision, even when a change in governing law is made by an administrative agency. [Citing *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 281 (1969).] The second holds that a reviewing court may "not supply a reasoned basis for the agency's action that the agency itself has not given." [Quoting *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).] Thus, because we are at liberty neither to evaluate the Commission's decision under FERC's *old* policy[,] nor to assess on our own how Panhandle's tariffs would fare under FERC's *new* policy, we are required to remand so that the Commission may indicate how, if at all, its decision would be affected by its intervening policy change.

Id. at 438-39 (footnotes omitted). See also *Williston Basin Interstate Pipeline Co.* v. *FERC*, 165 F.3d 54, 62-63 (D.C. Cir. 1999) (remanding to the FERC where an intervening change in agency policy regarding the calculation of return on common equity might require the appellant's rate of return to be recalculated); *Nat'l Fuel Gas Supply Corp.* v. *FERC*, 899 F.2d 1244, 1249-50 (D.C. Cir. 1990) (remanding to the agency where the legal basis for an agency's decision was undercut in a subsequent court of appeals decision).

The D.C. Circuit did not fashion this rule out of whole cloth. As explained in *Panhandle*, this Court's "intersect[ing] doctrines" of applying the law in force at the time of appeal,

and declining to supply reasons for an agency decision on which the agency did not rely, *require* a remand when an agency bases a decision on a rule that it then changes while the aggrieved party's appeal is pending. See *Panhandle*, 890 F.2d at 438-39 (citing *Thorpe*, 393 U.S. at 281, and *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43).

In fact, the D.C. Circuit's rule was arguably dictated by this Court's decision in *NLRB* v. *Food Store Employees Union*, 417 U.S. 1 (1974), in which this Court reversed a court of appeals decision that purported to apply a changed agency rule to the circumstances of the case before it. This Court explained, *inter alia*, that "a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act." *Id.* at 10 n.10.[11]

The Federal Circuit's decision in this case is inconsistent with the rule in the D.C. Circuit and the decisions of this Court on which the D.C. Circuit's longstanding rule is based. Here, before the Federal Circuit issued its mandate, the WTO held that Commerce's zeroing rule as used in investigations violated the treaty. Commerce announced that it would no longer use zeroing in investigations, and the WTO further ruled that Commerce's zeroing practice violates the United States' obligations under the Antidumping Agreement when used in administrative reviews, including the one at issue in this case. In light of these developments, Petitioners filed a petition for rehearing in the Federal Circuit requesting a stay for purposes of seeking a remand to the agency. Petitioners

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[11] Other courts of appeals have applied the *Food Store Employees* rule to require remands when agency decisions are later called into question by appellate decisions or changes in the governing agency rule. *See NLRB* v. *Coca-Cola Bottling Co. of Buffalo*, 55 F.3d 74, 78 (2d Cir. 1995); *Blackman-Uhler Chem. Div., Synalloy Corp.* v. *NLRB*, 561 F.2d 1118, 1119 (4th Cir. 1977) (en banc).

explained that Commerce, and not the federal courts, should decide whether to implement the WTO's rejection of zeroing in this administrative review as it had in pending and future investigations. The Federal Circuit, however, refused to rehear the case or to issue a stay to determine whether a remand was necessary.[12] Less than three weeks after the Federal Circuit issued this decision, the United States (as expected) assured the WTO and its treaty partners that it would fully comply with its obligations under the Antidumping Agreement in light of the WTO's decision rejecting the use of zeroing in administrative reviews.[13]

The Federal Circuit's decision below is plainly inconsistent with the rule the D.C. Circuit follows, and the rationale underlying that rule. The WTO's condemnation of zeroing as violative of U.S. treaty obligations in this case, and Commerce's response to a prior condemnation of the same practice in a closely analogous category of administrative proceedings, made it abundantly clear that the Federal Circuit's decision rested on legal principles that the agency was extremely likely to (and in fact did) change. In the D.C.

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[12] The Federal Circuit has steadfastly refused to remand Commerce's antidumping determinations despite the WTO's repeated determinations that the zeroing rule is invalid, and despite Commerce's announced intention to follow the WTO's decisions. In addition to the decision below, the Federal Circuit recently refused a similar remand request in *Corus Staal BV* v. *Department of Commerce*, and a Petition for a Writ of Certiorari is currently pending before this Court in that case. *See* Petition for Certiorari, *Corus Staal BV* v. *United States*, No. 06-1057 (filed Jan. 25, 2007). As in this case, the Federal Circuit denied Corus' request for rehearing to remand to the Department of Commerce, despite the fact that the WTO had earlier held that zeroing was a violation of treaty obligations in that case, and Commerce announced its intention to comply with the WTO's ruling. *See id.* at 6-9, 11-12. Indeed, the Federal Circuit apparently felt that its no-remand rule was so well established that it denied Koyo's and NTN's request without *any* explanation for its decision. *See* Pet. App. 2a.

[13] *Minutes*, Pet. App. 58a; Statement of David P. Shark, *supra*.

Circuit, petitioner would have obtained a stay and remand so that Commerce could decide whether petitioner should be found liable for dumping under the agency's new policy.

The Federal Circuit has adopted a different rule, however, which requires Petitioners and the Department of Commerce to live with an agency decision that was based on a rule subsequently disapproved by the WTO and the Department of Commerce. These flatly inconsistent approaches to judicial review of agency actions should be resolved by this Court.

II. THE FEDERAL CIRCUIT'S DECISION IS INCONSISTENT WITH THE CONSTITUTIONAL SEPARATION OF POWERS AND INTERFERES WITH THE EXECUTIVE BRANCH'S ABILITY TO COMPLY WITH THE UNITED STATES' TREATY OBLIGATIONS.

It is well established that the separation of powers requires courts to defer to the Executive Branch in matters involving the foreign affairs of the United States. See, *e.g.*, *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 35 (1945) ("[T]he courts should not so act as to embarrass the executive arm in its conduct of foreign affairs."); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936). Moreover, under the URAA, Congress has placed responsibility for implementing adverse WTO decisions squarely in the hands of the Executive Branch, specifically the Department of Commerce and the United States Trade Representative ("USTR"). See 19 U.S.C. §§ 3533(g), 3538.

The D.C. Circuit's remand rule—which accords with this Court's precedents—is doubly important in cases involving treaty obligations. In cases like this one, where an agency rule conflicts with treaty obligations and the Executive Branch announces its intention to modify its rule for that reason, a remand to the agency is necessary to allow the Executive Branch to reevaluate its earlier decision, thus minimizing the likelihood that the United States will act

contrary to its international obligations. Because the statute grants Commerce and the USTR sole responsibility for implementing adverse WTO decisions, a remand allows the Executive Branch properly to discharge its statutory and treaty obligations.

Indeed, the United States has given the WTO *specific assurances* that where (as here) an agency rule is to be revoked in implementing a WTO decision, "*Commerce* would need to decide what to do with respect to entries [*i.e.*, final administrative decisions] that took place prior to the date of revocation." Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act* ¶ 19, WT/DS221 (Mar. 8, 2002) (emphasis added), Pet. App. 66a. In that case, Canada challenged the United States' legal regime for implementing adverse WTO reports on grounds, *inter alia*, that it would not allow the Executive Branch to revisit its previously issued decisions when revoking an antidumping order. The United States argued, consistent with the remand rule that prevails in the D.C. Circuit, that *the agency* has authority to decide whether a policy change requires modification or reversal of the agency's prior decision, and that court-ordered remands were available as a vehicle by which implementation of WTO decisions could be obtained. *Id.* ¶ 19-20, Pet. App. 66a-67a. Based largely on this assurance, the WTO ruled that the United States was not in violation of its treaty obligations. See Panel Report, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act* ¶¶ 6.82-6.83, WT/DS221/R (July 15, 2002).

Consistent with these assurances, the United States also committed to the WTO in *this specific administrative review* that it will implement the WTO's rejection of zeroing. See *Minutes*, Pet. App. 58a; Statement of David P. Shark, *supra* (stating, in reference to the WTO's decision in *U.S. – Zeroing (Japan)*, that "the United States wishes to state that it intends to comply in this dispute with its WTO obligations and will

be considering carefully how to do so"). As explained, the United States has committed to Japan that it will fully implement the WTO Appellate Body's report by December 24, 2007. See *Agreement*, Pet. App. 59a. And, the Department of Commerce has stopped using zeroing in any new or pending antidumping investigations. See *Antidumping Proceedings*, 71 Fed. Reg. at 77,725. Petitioners are certainly entitled to a decision by the agency whether this change in policy applies to Petitioners' pending "administrative review," particularly since the Executive Branch has committed to the WTO and its treaty partners that it will implement the WTO's decision that zeroing violates treaty obligations in administrative reviews as well as investigations. See *U.S.-Zeroing (Japan)* ¶¶ 138, 166 (concluding that zeroing is inconsistent with the United States' treaty obligations in *both* "original investigations" and "periodic reviews"), Pet. App. 53a-54a.

The Federal Circuit's decision in this case prevents the United States from fulfilling its treaty obligations and implementing the assurances made by the Executive Branch to the WTO and U.S. treaty partners. A writ of certiorari is thus required to allow the Executive Branch to determine whether and how to comply with the WTO's explicit directives in this case. Indeed, unless this Petition is granted, there will be *no* way for the Executive Branch to comply with its treaty obligations in this administrative review, and Petitioners will be effectively unable to challenge dumping liability that was imposed in clear violation of the United States' treaty obligations.

As explained in footnote 12 above, the Federal Circuit's error is not an isolated incident. This is especially perplexing given the Federal Circuit's earlier solicitude for the Executive's prerogatives in such cases. In *Corus Staal BV* v. *Department of Commerce*, 395 F.3d 1343 (Fed Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006), decided after the WTO's rejection of zeroing in investigations but before Commerce's

announcement that it would implement fully the WTO's decision, the court of appeals explained that it could not usurp the Executive's role in deciding when and how to comply with treaty obligations.

> Congress ... has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement [the] WTO reports and determinations and, if so implemented, the extent of implementation.... We will not attempt to perform duties that fall within the exclusive province of the political branches.

Id. at 1349.

This attentiveness to the separation of powers was short-lived: as noted, the Federal Circuit abruptly and inexplicably changed its position in its next *Corus* decision and refused to remand the case to the agency following Commerce's announcement that it would repeal its zeroing rule. The same occurred here with regard to administrative reviews. Thus, the Federal Circuit is preventing the Executive from doing precisely what the court recognized the Executive should do. If not corrected by this Court, the Federal Circuit will perpetuate its error in all pending and future antidumping determinations to which adverse WTO decisions apply.[14]

* * * *

The Federal Circuit's decision in this case will frustrate the Executive Branch's attempts to implement the nation's treaty obligations, particularly in this and other antidumping proceedings. It also makes hollow the specific assurances the Executive Branch has made to the WTO and to U.S. treaty partners in this case, and assurances the United States made previously to the WTO in defending its legal regime for

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[14] As explained, the Federal Circuit has exclusive jurisdiction over appeals from antidumping decisions. *See* 28 U.S.C. § 1295(a)(5).

implementing adverse decisions. As this Court has emphasized, "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting domestic legislation in such [a] manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995). The same principle applies here. The Federal Circuit's refusal to entertain Petitioners' request for rehearing and a stay for the purpose of seeking a remand to the agency threatens the Executive Branch's ability properly to conduct the nation's foreign affairs and treaty relationships. Accordingly, this Court should intervene to correct this unwarranted violation of the separation of powers.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 6, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

05-1297, 05-1323

SNR ROULEMENTS,

Plaintiff,

and

KOYO SEIKO CO., LTD. and KOYO CORPORATION OF U.S.A.,

Plaintiffs-Appellants,

and

NSK CORPORATION, NSK BEARINGS EUROPE, LTD., and NSK LTD.,

Plaintiffs,

and

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN-DRIVESHAFT, INC., and NTN BOWER CORPORATION,

Plaintiffs-Appellants,

and

NTN-BCA CORPORATION,

Plaintiff,

and

INA SCHAEFFLER KG and INA USA CORPORATION,

Plaintiffs,

v.

UNITED STATES,
Defendant-Appellee,

and

THE TORRINGTON COMPANY
(now known as Timken US Corporation),
Defendant-Appellee.

December 8, 2006, Decided
December 8, 2006, Filed

DECISION WITHOUT PUBLISHED OPINION

RADER, *Circuit Judge*, ARCHER, *Senior Circuit Judge*, and PROST, *Circuit Judge*.

JUDGMENT

This CAUSE having been heard and considered it is ORDERED and ADJUDGED:

Per Curiam

AFFIRMED. See Fed. Cir. R. 36.

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

SLIP OP. 04-100.
COURT NO: 01-00686.

SNR ROULEMENTS, KOYO SEIKO CO., LTD., KOYO CORPORATION OF U.S.A., NSK CORPORATION, NSK BEARINGS EUROPE, LTD., NSK LTD., NTN-BCA CORPORATION, NTN BOWER CORPORATION, NTN-DRIVESHAFT, INC., AMERICAN NTN BEARING MANUFACTURING CORP., NTN BEARING CORPORATION OF AMERICA, NTN CORPORATION, INA-SCHAEFFLER KG, INA USA CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendant,

and

THE TORRINGTON COMPANY,

Defendant-Intervenor.

Aug. 10, 2004

OPINION

GOLDBERG, *Senior Judge*.

In this action, plaintiffs challenge the United States Department of Commerce's ("Commerce") final determination in the 11th administrative review of dumping orders covering antifriction bearings in *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.; Notice of Final Results of Antidumping Duty Admin-*

istrative Reviews and Revocation, 66 Fed.Reg. 36551 (July 12, 2001) ("*Final Results*").[1] Defendant-Intervenor The Torrington Company ("Torrington") also challenges certain aspects of the *Final Results*. The *Final Results* covers the period of review May 1, 1999 through April 30, 2000 for ball bearings and May 1, 1999 through December 31, 1999 for cylindrical roller bearings and spherical plain bearings. Pursuant to USCIT R. 56.2, plaintiffs and defendant-intervenor move for summary judgment and request the Court to remand Commerce's *Final Results*.

For the reasons that follow, the Court sustains in part and reverses and remands in part the *Final Results*. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c).

I. *STANDARD OF REVIEW*

The Court will sustain the *Final Results* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). To determine whether Commerce's construction of the statutes is in accordance with law, the Court looks to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The first step of the test set forth in *Chevron* requires the Court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. 2778. It is only if the Court concludes that "Congress either had no intent on the matter, or that Congress's purpose and intent regarding the matter is ultimately unclear," that the Court will defer to Commerce's

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[1] Plaintiffs in this action are SNR Roulements ("SNR"); Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo"); NSK Corporation, NSK Bearings Europe, Ltd., and NSK Ltd. ("NSK"); NTN-BCA Corporation, NTN Bower Corporation, NTN-Driveshaft, Inc., American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, and NTN Corporation ("NTN"), and INA-Schaeffler KG and INA USA Corporation ("INA").

construction under step two of *Chevron*. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed.Cir.1998). If the statute is ambiguous, then the second step requires the Court to defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 842. In addition, "[s]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed.Cir.2001) (interpreting *United States v. Mead*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)). Accordingly, the Court will not substitute "its own construction of a statutory provision for a reasonable interpretation made by [Commerce]." *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed.Cir.1992).

II. *DISCUSSION*

A. Commerce's Exclusion of SNR's Imputed Expenses In Calculating Total Expenses For Constructed Export Price Profits Is In Accordance With Law.

SNR challenges Commerce's calculation of constructed export price ("CEP") profits, arguing that the inclusion of imputed expenses in its calculation of "total U.S. expenses" necessitates the inclusion of those same imputed expenses in its calculation of "total expenses."

CEP profits are determined by multiplying the total actual profit by the percentage determined by dividing the total United States expenses by the total expenses. 19 U.S.C. § 1677a(f)(1); 19 U.S.C. § 1677a(f)(2)(A). "Total actual profit" is defined as "the total profit earned by the foreign producer, exporter and affiliated parties . . . with respect to the sale of the same merchandise for which total expenses are determined[.]" 19 U.S.C. § 1677a(f)(2)(D). "Total expenses" consist of "all expenses . . . which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the U.S. seller

affiliated with the producer or exporter with respect to the production and sale of such merchandise." 19 U.S.C. § 1677a(f)(2)(C). The price used to establish CEP is reduced by "the amount of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or merchandise to which value has been added)." 19 U.S.C. § 1677a(d)(1). These expenses include "expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties" and "any selling expenses not deducted under subparagraph (A), (B), or (C)." 19 U.S.C. § 1677a(d)(1)(B) and (D).

In short, when calculating CEP profit, the statute permits a reduction by the applicable percentage (i.e., a portion of total profit), thereby ensuring that the CEP profit calculation accurately reflects whether, and to what degree, the exporter has an unfair advantage over the domestic producer.

SNR argues that Commerce erred by not including imputed credit and inventory carrying expenses in its calculation of "total expenses"—because they were included in its calculation of "total United States expenses." SNR requests that this issue be remanded to Commerce with instructions to include the imputed credit and inventory carrying expenses in its calculation of "total expenses" for the purpose of calculating CEP profit.

Commerce denies that it failed to comport with the plain meaning of the statute and argues instead that its calculations are based on "normal accounting principles [which] permit the deduction of only actual booked expenses, not imputed expenses, in calculating profit." *See* Memo of the United States in Opposition to the Plaintiffs' Motions for Judgment upon the Agency Record ("Def.'s Br.") at 96. Commerce also argues that the inclusion of imputed expenses in the calculation of total expenses would result in a partial double counting of the expenses which would result in a distortion of

the ratio of total U.S. expenses to total expenses. *Id.* at 95. Additionally, Commerce argues that if Congress had intended to require both total U.S. expenses and total expenses to be calculated using the same figures Congress would not have used disparate definitions when defining the two terms. *Id.* Finally, Commerce cites *U.S. Steel Group v. United States*, 225 F.3d 1284 (Fed.Cir.2000), followed by the Court of International Trade in *Timken v. United States*, 26 CIT ___, 240 F.Supp.2d 1228 (2002), which specifically rejects the argument that symmetry must exist in the ratio of total U.S. expenses to total expenses.

The Court first turns to the plain language of the statute under *Chevron* step-one. First, the Court finds the statute does not clearly address the use of imputed expenses in the calculation of total expenses or total profit. *See Timken*, 26 CIT at ___, 240 F.Supp.2d at 1245; *cf. SNR Roulements v. United States*, 24 CIT 1130, 1139, 118 F.Supp.2d 1333, 1341 (2000); *NTN Bearing Corp. of America v. United States*, 25 CIT 664, 694, 155 F.Supp.2d 715, 743 (2001). Second, on the issue of whether computational symmetry is statutorily required, the Court refers to *U.S. Steel Group*, which sustained Commerce's practice of including imputed expenses in the calculation of total United States expenses, but not including imputed expenses in the calculation of total expenses. *See id.* at 1290. Symmetry between the two is not required because "the definitions of the Act themselves under cut symmetrical treatment of 'total U.S. expenses' and 'total expenses.'" *U.S. Steel Group*, 225 F.3d at 1290. Total U.S. expenses are not a subset of total expenses because "[t]he statute itself defines 'total U.S. expenses' distinctly, both structurally and substantively, from 'total expenses.'" *Id.* at 1289.

Even if *U.S. Steel Group* was not applicable to selling expenses, Commerce's methodology was a reasonable interpretation of the statute. *Timken*, 26 CIT at ___, 240

F.Supp.2d at 1246. "Commerce has some flexibility in determining total United States expenses under 19 U.S.C. § 1677a(d)(1)-(2) . . . [b]ut if Commerce decides to include a category of expenses in calculating total United States expenses . . . it must also include such expenses in [total expenses] *unless* they are already represented in total expenses *in some other fashion.*" *Thai Pineapple Canning Indus. Corp. Ltd. v. United States*, 23 CIT 286, 296, 187 F.3d 1362 (1999), *aff'd in part, rev'd in part*, 273 F.3d 1077 (Fed.Cir.2001) (emphasis added).

Although imputed numbers for total U.S. expenses may not be exactly the same as those for total expenses, they are reasonable surrogates for each other. *See Timken*, 26 CIT at ___, 240 F.Supp.2d at 1247. Following *Timken*, the Court holds that "although the definitions of both total United States expenses and total expenses direct Commerce to include a figure for selling expenses, it is not clear from the statute that these figures need to be precisely the same." *Timken*, 26 CIT at ___, 240 F.Supp.2d at 1237. "Theoretically, the total expenses denominator would reflect the interest expenses captured in the U.S. sales expenses numerator . . . *as well as* 'home' market interest expenses, because the total expenses denominator is derived from a net unit figure based on all company interest expenses without regard to sales destination." *Id.* (quoting *Thai Pineapple Canning Indus. Corp. Ltd. v. United States*, 24 CIT 107, 115, 2000 WL 174986 (2000) (emphasis added)).

Although companies may not track the per customer cost of maintaining inventory or extending credit, Commerce reasonably recognizes that companies do actually incur these costs. As a result, Commerce asks respondents to impute these costs to aid in the calculation of normal value and U.S. price. If a peculiarity or discrepancy arises as a result of the use of imputed amounts in the calculation of total U.S. expenses and the use of actual amounts in the calculation of

total expenses, Commerce's findings may be challenged (1) by demonstrating that a distortion was caused by different expenses over time or (2) that the inclusion of imputed expenses will not result in double counting because there were no actual U.S. expenses included in the actual booked expenses. The Court concludes that SNR has not demonstrated either condition. Commerce has shown that the actual booked expenses included in the calculation of total expenses account for amounts representing the imputed U.S. credit and inventory carrying expenses, and SNR has failed to demonstrate any peculiarity or discrepancy which necessitates the inclusion of imputed expenses because they are not otherwise accounted for.

Accordingly, Commerce's exclusion of imputed expenses in its calculation of total expenses for CEP profit is sustained.

B. Commerce's Use Of The 99.5 Percent Arm's Length Test To Exclude Certain Home Market Sales By Koyo To Affiliates Is In Accordance With Law.

In comparing Koyo's export prices to Koyo's home market prices, Commerce excluded from Koyo's home market sales database any sales to an affiliated party where the weighted average price was less than 99.5 percent of the weighted average price of non-affiliated parties. In light of the World Trade Organization ("WTO") Appellate Body's decision in *United States—Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001) ("*Hot Rolled Steel*"), Koyo asserts that this 99.5 percent "arm's length" test violates U.S. obligations under international law. In *Hot Rolled Steel*, the WTO Appellate Body held that the arm's length test established dumping in a manner impermissible under the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade ("Anti-Dumping Agreement").

To determine whether merchandise has been dumped, 19 U.S.C. § 1677b(a) requires Commerce to make "a fair comparison" between the export price and normal value. Commerce excludes from the calculation of normal value any sale to an affiliated party that is not comparable to sales to non-affiliated parties pursuant to 19 C.F.R. § 351.403(c). To ensure that sales to affiliates are comparable to sales to non-affiliates (i.e., at arm's length) under § 351.403(c), Commerce adopted the 99.5 percent arm's length test, which was applied in the *Final Results*.

The ambiguity of the statutes and regulations regarding the definition of "ordinary course of trade" precludes analysis under the first step of *Chevron*. *See Timken v. United States*, 26 CIT ___, ___, 240 F.Supp.2d 1228, 1240 (2002). Under the second step of *Chevron*, Commerce's use of the 99.5 percent arm's length test has been repeatedly upheld as reasonable. *See, e.g., Usinor v. United States*, 18 CIT 1155, 1158, 872 F.Supp. 1000, 1004 (1994) (affirming the test as reasonable where plaintiff failed to show that it distorted price comparability); *SSAB Svenskt Stal AB v. United States*, 21 CIT 1007, 1010, 976 F.Supp. 1027, 1030 (1997) (upholding the test as reasonable even though there was no showing that plaintiff had deliberately manipulated affiliate prices); *Micron Technology, Inc. v. United States*, 19 CIT 829, 846, 893 F.Supp. 21, 38 (1995) (sustaining Commerce's use of the test where plaintiff made no showing that its excluded affiliate sales had been made at arm's length).

1. Koyo Has Standing Under 19 U.S.C. § 3512(c)

Commerce asserts that 19 U.S.C. § 3512(c)[2] bars Koyo's claim that the arm's length test is inconsistent with the

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[2] Section 3512(c) states that "[n]o person other than the United States . . . may challenge . . . any action or any inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with [a WTO agreement]." 19 U.S.C. § 3512(c)(1).

WTO's decision in *Hot Rolled Steel*. Section 3512(c) bars private parties from bringing claims directly against the government alleging that Commerce acted inconsistently with a WTO agreement. However, Koyo's claim does not arise directly under the AntiDumping Agreement or any other WTO agreement. Rather, Koyo is "free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so." *Gov't of Uzbekistan v. United States*, 25 CIT 1084, 1088, 2001 WL 1012780 (2001). By relying on § 3512(c), Commerce merely asserts an "erroneous technical bar" in this case, and thus Koyo's claim is properly before the Court. *See Gov't of Uzbekistan*, 25 CIT at 1088, 2001 WL 1012780.

2. Relevance of Hot-Rolled Steel

The effect of WTO dispute settlement decisions on U.S. domestic trade law is intricate and rife with particularly delicate issues of statutory interpretation and separation of powers.

The classic tenet of statutory interpretation in light of international obligations is that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 81, 2 L.Ed. 208 (1804) ("*The Charming Betsy*"); *see also Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed.Cir.1995) ("[A]bsent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.")

The *Charming Betsy* doctrine may conflict in certain circumstances with the deference that courts owe to interpretations of statutory law by agencies.[3] A court must yield

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[3] *See* Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 Fordham Int'l L.J. 1533 (2001).

to an agency's interpretation of an ambiguous statute so long as it "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. Agencies are accountable to the elected executive, and thus, policy decisions are best left to them rather than to non-elected judges. *See id.* at 865-66, 104 S.Ct. 2778. Moreover, the judiciary generally grants the executive branch an even greater level of deference in the area of foreign affairs. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936). However, courts have held that "Chevron must be applied in concert with the *Charming Betsy* doctrine when the latter is implicated." *Usinor v. United States*, 26 CIT ___, ___, 2002 WL 1998315, *8 (quoting *Hyundai*, 23 CIT at 313, 53 F.Supp.2d at 1344); *see also Timken*, 26 CIT at ___, 240 F.Supp.2d at 1240 (determining that "the court must determine if the Department's interpretation is reasonable, as informed by *Chevron* step-two and *Charming Betsy*").

WTO decisions are not binding on the Court nor on Commerce. *See Hyundai Elecs. Co. v. United States*, 23 CIT 302, 311, 53 F.Supp.2d 1334, 1343 (1999); *see also Corus Staal BV v. United States*, 27 CIT ___, ___, 259 F.Supp.2d 1253, 1273 (2003) (upholding Commerce's practice of zeroing contrary to a WTO Appellate Body decision concerning the European Communities' use of zeroing); *see also Timken*, 26 CIT at ___, 240 F.Supp.2d at 1242 (sustaining the arm's length test, in part by distinguishing *Hot Rolled Steel*). WTO decisions may, however, shed light on whether an agency's practices and policies are in accordance with U.S. international obligations. *See Hyundai*, 23 CIT at 311-12, 53 F.Supp.2d at 1343.

Timken examined the WTO's decision in *Hot Rolled Steel* as it related to the same application of the arm's length test and concluded that Commerce's 99.5 percent test was a reasonable interpretation of "ordinary course of trade." Thus, a closer look at both *Hot Rolled Steel* and *Timken* is warranted.

Hot Rolled Steel did not find that 19 U.S.C. § 1677b or 19 C.F.R. § 351.403 violated the Anti-Dumping Agreement. *Timken*, 26 CIT at ___, 240 F.Supp.2d at 1242. Rather, the WTO Appellate Body found that Commerce's 99.5 percent arm's length test does "not rest on a permissible interpretation of the term 'sales in the ordinary course of trade'" in Article 2.1 of the Anti-Dumping Agreement[4] due to its lack of "even-handedness." *Hot Rolled Steel* at ¶ 148. First, the test was found to be asymmetric because it automatically excludes lower-priced affiliate sales using a numerical threshold of 99.5 percent. *Id.* at ¶ 149. In contrast, there is no bright line test for higher-priced affiliate sales. Instead, such sales can be excluded from the calculation of home market sales only if Commerce deems the sales aberrationally high, a fact on which a respondent has the burden of proof. *Id.* at ¶ 151. The WTO Appellate Body determined that the 99.5 percent test is more likely to result in a higher home market price and, as a consequence, a finding of dumping. *Id.* at ¶ 154. In essence, *Hot Rolled Steel* concluded that Commerce is afforded considerable discretion in determining whether any given sales to affiliated parties are not in the ordinary course of trade but held that such discretion must be exercised in an evenhanded manner.

> *Timken* sustained Commerce's use of the arm's length test, distinguishing the case from the facts in *Hot Rolled Steel*. *Hot Rolled Steel* reasoned that exporters had no notice of the aberrationally-high standard and thus had no reason to supply evidence that high-priced sales to

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[4] Article 2.1 of the Anti-Dumping Agreement provides:

> [A] product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

affiliates were aberrational. *Id.* at ¶ 155. In contrast, Timken pointed out that the foreign respondent, Koyo, did have notice of the aberrationally-high standard. *Timken*, 240 F.Supp.2d at 1241. With such notice and Koyo's failure to argue that the arm's length test had excluded any sales in the ordinary course of trade, *Timken* reasoned that Koyo was not pre-judiced as the foreign respondents were *in Hot Rolled Steel*.[5] *See id.* at 1242. *Timken* found compelling Commerce's rationale for applying an asymmetric test—namely, that exporters are likely to provide advantageous information, such as why a high-priced affiliate sale is not in the ordinary course of trade, but may withhold disadvantageous evidence of lower-priced affiliate sales that are not in the ordinary course of trade. *Id.* at 1241-42.

The relevance of a WTO dispute settlement decision in this context lies solely in its persuasive force as a means of properly interpreting a controlling statute. *See Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60 ("[I]t is emphatically the province and duty of the judicial department to say what the law is."). This persuasive force, however, must be carefully balanced with the reasoned rulemaking process underlying *Chevron* step-two deference. The Court is wary of overstepping the bounds of its judicial authority under the guise of the *Charming Betsy* doctrine. *See*

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[5] Contrary to the reasoning in *Timken*, it is at least arguable that the WTO Appellate Body did not intend to confine its reasoning to the facts at issue in *Hot Rolled Steel*. Rather, *Hot Rolled Steel* held that "the *application* of the 99.5 percent test does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade.'" *Hot Rolled Steel* at ¶ 158 (emphasis in original). The *Hot Rolled Steel* decision rejected the rationale for Commerce's policy, applied to the specific case and generally. *See id.* at ¶ 157 (noting that Commerce's test focuses on the distortion of low affiliate prices whereas the Anti-Dumping Agreement's language applies to sales both above and below the home market price established in the ordinary course of trade).

Hyundai, 23 CIT at 313-14, 53 F.Supp.2d. at 1345 (stating that "unless the conflict between an international obligation and Commerce's interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce's regulatory authority under the *Charming Betsy* doctrine"). The Court is also mindful of the prerogative of the Executive Branch—most importantly, the Office of the U.S. Trade Representative—in dealing with the WTO in its diplomatic and policymaking roles. *See id.* at 312, 53 F.Supp.2d at 1343. Thus, in light of prior decisions that have found the 99.5 percent test to be reasonable, the Court holds that *Chevron* deference controls here.[6]

Accordingly, Commerce's use of the 99.5 percent arm's length test to exclude certain home market sales by Koyo to affiliated parties is sustained.[7]

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[6] The Court declines to reach the issue of whether a WTO dispute settlement decision interpreting a WTO agreement may constitute an international obligation under any circumstances in applying the *Charming Betsy* doctrine.

[7] The Court notes that since the publication of the *Final Results* and the filing of the instant case, Commerce has adopted a new policy for its arm's length test to comply with *Hot Rolled Steel*. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed.Reg. 69186 (Nov. 15, 2002). This change in methodology provides for the overall ratio calculated for an affiliate to be between 98 percent and 102 percent of prices to unaffiliated customers in order for sales to that affiliate to satisfy the arm's length test. *See id.* at 69187; *see also Stainless Steel Plate in Coils from Belgium: Preliminary Results of Antidumping Duty Administrative Review*, 69 Fed.Reg. 32501 (June 10, 2004) (applying the new test). Incorporating the reasoning of *Hot Rolled Steel*, Commerce has described this new test as "consistent with the view, expressed by the WTO Appellate Body, that rules aimed at preventing the distortion of normal value through sales between affiliates should reflect, 'even handedly,' that both high and low-priced sales between affiliates might not be 'in the ordinary course of trade.'" *Id.*

C. Commerce's Practice of Zeroing Is In Accordance With Judicial Precedent and Does Not Violate the Antidumping Statute.

Koyo and NSK challenge Commerce's practice of zeroing in its calculation of dumping margins. Commerce calculates the dumping margins on individual U.S. transactions and then calculates the weighted-average dumping margin "by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate . . . constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B). In calculating the weighted-average dumping margin, Commerce treats transactions that produce "negative" dumping margins—that is, transactions in which the export price exceeds normal value—as if they were zero, a practice commonly referred to as "zeroing."

1. EC-Bed Linen *Is Not Binding or Persuasive*

Koyo first claims that Commerce's practice of zeroing is impermissible under U.S. law. Koyo argues that the decision of the WTO Appellate Body in *European Communities—Antidumping Duties on Import of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ("*EC-Bed Linen*") prohibits Commerce's practice of zeroing. In *EC-Bed Linen*, the WTO Appellate Body found that the European Communities' ("EC") use of zeroing was inconsistent with the Anti-Dumping Agreement. Koyo argues that Commerce's practice is the functional equivalent of the EC's practice. *See* Motion of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. for Judgment on the Agency Record ("Koyo Br.") at 18-21. Koyo claims that zeroing is unlawful under the *Charming Betsy* doctrine.

With respect to Koyo's *EC-Bed Linen* argument, the Court is bound by the Federal Circuit's recent decision in *Timken v. United States*, 354 F.3d 1334 (Fed.Cir.2004). As a threshold matter, the Federal Circuit held, as the Court does here, that

Koyo's claim is not barred by 19 U.S.C. § 3512(c). *Id.* at 1341; *see also, supra*, III.B. *Timken*, however, rejected Koyo's WTO-based arguments by holding that Commerce's practice of zeroing was not prohibited by *EC-Bed Linen*: "In light of the fact that Commerce's 'longstanding and consistent administrative interpretation is entitled to considerable weight,' we refuse to overturn the zeroing practice based on *EC-Bed Linen*." *Id.* at 1344 (quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978)). The Federal Circuit distinguished *Timken* from *EC-Bed Linen*, stressing that the United States had not been a party in the latter and that *EC-Bed Linen* had dealt with an antidumping investigation and not an administrative review as was the case in *Timken*. *Id.*

Accordingly, the Court holds that Commerce's use of zeroing is not invalidated by *EC-Bed Linen*.[8]

2. The Plain Language of the Antidumping Statutes Is Ambiguous and Mandates Deference to Commerce's Zeroing Practice

NSK and Koyo challenge zeroing as contradictory to the plain language of 19 U.S.C. § § 1673 and 1677. Commerce argues that the plain language of the antidumping statutes actually mandates zeroing. The Court holds that the language of 19 U.S.C. § 1673 neither unambiguously requires *nor* prohibits zeroing under the first step of *Chevron*.

NSK suggests that the plain meaning of 19 U.S.C. § 1673 unambiguously renders Commerce's practice of zeroing impermissible. *See* Memorandum of Points and Authorities

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[8] A divided WTO panel recently found Commerce's practice of zeroing to be impermissible under the Anti-Dumping Agreement. *See United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264 (Apr. 13, 2004) ("*Softwood Lumber*"). The Court finds *Softwood Lumber* insufficiently persuasive in light of the Federal Circuit's decision in *Timken*.

in Support of NSK Bearings Europe's Motion for Judgment on the Agency Record ("NSK Europe Br.") at 5. According to NSK, the focal point of an antidumping inquiry is the class or kind of merchandise.[9] Because § 1673 specifies that antidumping duties apply only when Commerce determines that a "class or kind of foreign merchandise" is being, or is likely to be sold at less than its fair value, "Commerce's dumping calculation violates this basic principle, because it trivializes the presence of U.S. sales above fair value by wiping out (i.e., by zeroing) the difference by which the export price or constructed price of these sales exceeds normal value." NSK Europe Br. at 11. NSK notes that other statutory provisions support the premise that zeroing is unlawful. NSK claims that the definition of "dumped" and "dumping" contained within 19 U.S.C. § 1677(34) "reformulates the first requirement of § 1673 that sales below fair value are dumped but sales above fair value are not." *Id.* at 8. NSK also maintains that the definition of "dumping margin" contained within 19 U.S.C. § 1677(35)(A) "reaffirms that dumping only exists when normal value exceeds the export price or constructed export price of *the subject merchandise*, which

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[9] NSK claims that the "entire structure of U.S. antidumping law" rests upon § 1673, which provides that:

> (1) the administering authority determines that *a class or kind of foreign merchandise* is being, or is likely to be sold, in the United States at less than its fair value, and
>
> (2) the Commission determines that . . .
>
> > (b) the establishment of an industry is materially retarded, by reason of imports of *that merchandise* or by reasons of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed *upon such merchandise* an antidumping duty . . . in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for *the merchandise*[.]

19 U.S.C. § 1673 (emphasis added).

section [19 U.S.C. § 1677(25)] defines as the 'class or kind of merchandise within the scope of an investigation.'" *Id.*

Even though NSK's argument presents what could be deemed logical inferences of 19 U.S.C. §§ 1673 and 1677, the logic does not go so far as to make NSK's interpretation of the statute unambiguous. Webster defines "class" as "a group, set, or kind marked by common attributes . . ." and "kind" as "a group united by common traits or interests." Webster's Third New International Dictionary (unabridged) 416, 1243 (1986). These definitions could be construed to require the subject merchandise to be considered in their entirety and thus bar zeroing. On the other hand, §§ 1673 and 1677 could also be construed to require Commerce to evaluate individual transactions only from the perspective of a common group of merchandise. Such an interpretation would leave the statutory authority ambiguous.

Koyo contends that Commerce's argument must fail because 19 U.S.C. § 1677 does not explicitly mention "zeroing." *See* Reply Brief of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. in Support of Their Motion for Judgment on the Agency Record at 13-19.

Commerce argues that the plain language of § 1677 unambiguously requires the zeroing of sales with negative margins. Commerce contends that § 1677(34) defines the terms "dumped" and "dumping" as "the sale or likely sale of goods at *less than* fair value" (emphasis added). Commerce also points to § 1677(35)(A), which defines the term "dumping margin" as "the amount by which the normal value *exceeds* the export price". Def.'s Br. at 53. Commerce also argues that a failure to zero out negative margins would permit those negative margins to effectively cancel out dumped sales, "effectively eviscerating the very purpose of the antidumping law." Def.'s Br. at 55.

A combined reading of §§ 1673 and 1677 does not unambiguously mandate zeroing. "A plain reading of the statute discloses no provision for Commerce to offset sales made at [less than fair value] with sales made at fair value." *Serampore Indus. Pvt. Ltd. v. Dep't of Commerce*, 11 CIT 866, 873, 675 F.Supp. 1354, 1360 (1987); *see Timken*, 354 F.3d at 1342. The use of the word "exceeds" in § 1677(35)(A) does not explicitly require that dumping margins be positive. *See Timken*, 354 F.3d at 1342. Thus, when considered in conjunction with relevant case law, NSK's and Koyo's respective arguments help serve to refute Commerce's claim that the statute unambiguously requires zeroing.

Having found the antidumping statutes ambiguous regarding zeroing, the Court next considers whether Commerce's practice is based on a permissible construction of the statutes under the second step of *Chevron*. In *Timken*, the Federal Circuit observed three reasons for affirming Commerce's practice of zeroing as a permissible construction of the dumping statute. First, the word "exceeds" could justify a practice of finding dumping margins only where the normal value "falls to the right of [the export price] on the number line." *Id.* Second, zeroing was found to be in accord with Commerce's practice of assessing dumping duties on an entry-by-entry basis. *Id.* Finally, because zeroing checks the practice of masked dumping—hiding a few transactions with dumped sales under the curtain of multiple sales at fair price—the Federal Circuit deemed the practice proper. *Id.* at 1343. Where Commerce has construed the statute in a way reasonably designed to prevent masked dumping, the Court will not substitute its own interpretation for that of Commerce. *See Serampore*, 11 CIT at 874, 675 F.Supp. at 1361.

It has been noted that statistical biases inherent in Commerce's zeroing practice prevent the statute from being equivocal. *See Bowe Passat Reinigungs-Und Waschereitechnik Gmbh v. United States*, 20 CIT 558, 570-72, 926 F.Supp.

1138, 1149-50 (1996) (upholding Commerce's zeroing practice "[u]nless and until it becomes clear that such a practice is impermissible or unreasonable"). The proportion of fair sales to dumped sales does not affect the Court's determination of the reasonableness of Commerce's interpretation. In *Bowe Passat*, the Court sustained Commerce's zeroing practice even where 92 percent of Bowe Passat's U.S. sales were made at or above fair market value. *Id.* at 571, 926 F.Supp. at 1149. Here, Commerce found a dumping margin where 67 percent of NSK Europe's U.S. sales and 89 percent of NSK Japan's U.S. sales exceeded normal value. *See* NSK Europe Br. at 2; Memorandum of Points and Authorities in Support of NSK Ltd.'s Motion for Judgment on the Agency Record ("NSK Japan Br.") at 2. The Court cannot find any basis for rejecting Commerce's determination on these grounds. *See Bowe Passat*, 20 CIT at 570-72, 926 F.Supp. at 1149-50.

NSK further claims that zeroing is not only biased, but punitive in nature, which is specifically prohibited in the antidumping statute. *See id.; see also Nat'l Knitwear & Sportswear Ass'n v. United States*, 15 CIT 548, 558, 779 F.Supp. 1354, 1373 (1991) ("[A]ntidumping duty law . . . is intended to be remedial, not punitive").

To be punitive, a duty must lack relation between the cost imposed and the harm done. *See Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1380 (Fed.Cir. 2003). The statistical bias inherent in zeroing is mitigated by the fact that the denominator used in calculating the dumping margin includes sales both above and below fair value. *See Bowe Passat*, 20 CIT at 571-72, 926 F.Supp. at 1150. Such inclusion of fair value and dumped sales thus creates a rational connection between the harm done—dumping—and the penalty imposed—the dumping margin.

Accordingly, Commerce's zeroing of Koyo's and NSK's negative dumping margins is sustained.

D. Commerce's Use Of Adverse Facts Available To NTN's Home Market and U.S. Freight Expenses Was Reasonable and In Accordance With Law.

NTN challenges Commerce's use of adverse facts available to NTN's home market and U.S. freight expenses.

Commerce requested that NTN report its freight expense allocation in terms of weight. Pursuant to 19 C.F.R. § 351.401(g)(2), Commerce's questionnaire directed that if an interested party was unable to allocate freight expenses on the basis on which they were incurred, the party should have (1) explained how it allocated expenses; (2) explained why the party could not allocate expenses on any of the bases on which they were incurred; and (3) demonstrated that the allocation methodology used was not distortive. Rule 56.2 Motion and Memorandum For Judgment Upon the Agency Record Submitted On Behalf of the Plaintiffs and Defendant-Intervenors, NTN et al. at 6 ("NTN Br."). Commerce's regulations, specifically 19 C.F.R. § 351.401(g)(2), emphasize the importance that a party demonstrate why its own methods are not distortive. NTN determined that it could not report the freight expense allocation on the basis on which it was incurred because of multiple, inconsistent variables. Instead, NTN reported its freight allocation on the basis of the sales value of the merchandise, claiming it was the only consistent factor. While Commerce accepted this reporting methodology in past reviews, for this review, Commerce requested NTN to report its freight expense allocation in terms of weight, and sent NTN two supplemental questionnaires specifically requesting this information. NTN failed to comply. To justify its use of adverse facts available, Commerce determined that NTN was not cooperating to its full ability, and specifically that NTN failed to show why its methodology, in terms of value, was not distortive. Issues and Decision Memorandum for the Administrative Reviews of Antifriction Bearings (other than tapered roller bearings)

and parts thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom—May 1, 1999, through April 30, 2000 ("Issues and Decision Memo"), Comment 34.

Commerce is required to use facts otherwise available if a respondent "withholds information that has been requested" or "fails to provide such information by the deadlines for the submission of the information or in the form and manner requested." 19 U.S.C. § 1677e(a)(A) and (B).

The Court finds that Commerce adequately considered NTN's submission of freight expenses in terms of weight, and acted within its statutory authority in applying adverse facts. Commerce determined that because of NTN's refusal to submit the requested weight data, NTN did not cooperate to the best of its ability as is required by § 1677m(e). If Commerce anticipates rejecting a party's submitted information, § 1677m(d) requires Commerce to give notice of the deficiency to the party. Commerce complied with § 1677m(d) by giving sufficient notice to NTN in the two supplemental questionnaires, specifically requesting the data in terms of weight. Commerce explicitly determined that NTN did not comply with the requirements to use its own allocation methodology. Specifically, in pursuing its option of submitting an alternative methodology based on value, NTN never explicitly explained to Commerce why its methodology was not distortive as required by 19 C.F.R. § 351.401(g)(2). In addition, Commerce acted in accordance with § 1677m(c)(1), which requires Commerce to modify its request for information to avoid imposing an unreasonable burden on the respondent.[10] Commerce considered NTN's

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[10] Under 19 U.S.C. § 1677m(c)(1):

> If an interested party, promptly after receiving a request from the administering authority . . . for information, notifies the administering authority . . . that such party is unable to submit the information requested in the requested form and manner . . . , the administering authority . . . shall consider the ability of the inter-

ability to submit the freight expenses in terms of weight and determined that NTN would have been able to submit such information, regardless of NTN's contention that a ruling based on weight rather than value would have been distortive.

Accordingly, Commerce's use of adverse facts available for NTN's home market and U.S. freight expenses is sustained.

E. Commerce's Inclusion Of NTN's Export Price Sales in Calculating Constructed Export Price Profit Adjustment Is In Accordance With Law.

NTN argues that Commerce should not have included export price ("EP") sales in its calculation of CEP profit adjustment. NTN asserts that 19 U.S.C. § 1677a(f)(2)(C), which defines total expenses as "all expenses in the first of three categories which applies and which are incurred by or on behalf of the foreign like product sold in the exporting country" does not include any explicit provision about export price expenses. Therefore, based on the plain language of the statute, Commerce may not include EP sales in its CEP profits.

Commerce responds that its inclusion of EP sales in CEP profits is a reasonable interpretation of § 1677a(f)(2)(C), consistent with its prior practice, and otherwise in accordance with law. According to Commerce, "'total expenses' refers to all expenses incurred with respect to the subject merchandise sold in the United States. . . . Thus, where the respondent makes both export-price and CEP sales to the United State[s] (sic), sales of the subject merchandise would encompass all such transactions." Def.'s Br. at 32. There-

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ested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

19 U.S.C. § 1677m(c)(1).

fore, as NTN made both EP and CEP sales in the United States, Commerce's inclusion of EP sales is proper.

The Court finds that Commerce's decision to include EP sales in the CEP profit adjustment calculation was reasonable and in accordance with law. The term total expenses is not exclusive to CEP sales but may also include EP expenses. *See Torrington Co. v. United States*, 25 CIT 395, 426, 146 F.Supp.2d 845, 882 (2001), *aff'd*, 62 Fed.Appx. 950 (Fed.Cir.2003). Because "subject merchandise" refers to the class or kind of merchandise that is within the scope, it is reasonable for Commerce to include EP sales when EP sales were made. *Id.* In the first category of expenses, total expenses include "subject merchandise sold in the United States," including any merchandise within the scope of the review. *Id.* This definition also includes EP sales, as EP sales were made by NTN.

Accordingly, Commerce's inclusion of EP sales in the CEP profit adjustment calculation is sustained.

F. Commerce's Inclusion of NTN's CT Scan Bearings in the Margin Calculation Is Remanded for Clarification.

Commerce included CT scan bearings in its calculation of NTN's dumping margin even after informing NTN that CT scan bearings would be excluded from the scope of the administrative review. NTN argues that Commerce should exclude NTN's CT scan bearings from its margin calculation. In its original investigation, Commerce found "slewing rings" or "turntable bearings" to be distinct from antifriction bearings. Seeking to confirm that Commerce would continue to exclude these bearings from the scope, NTN requested a ruling from Commerce on this issue on May 24, 2001. Commerce responded to NTN by letter, dated July 10, 2001, ruling that "turntable slewing bearings are not within the scope of the order." NTN Br., Attachment A. Two days later, on July 12, 2001, Commerce issued the *Final Results*, which

included these same bearings in the margin calculations. *See* 66 Fed.Reg. at 36552.

In response, Commerce argues that recalculating the margin would create an administrative burden, add uncertainty, and defeat the principle of finality. *See* Def.'s Br. at 51. Commerce also claims that the *Final Results* had already been signed for five days prior to the issuance of the July 10, 2001 letter.

The Court finds that Commerce did not adequately address the issue raised by NTN. Accordingly, the Court remands this issue with instructions to clarify the circumstances in which the July 10, 2001 letter, confirming the exclusion of CT scan bearings, was published while the *Final Results* included the same subject merchandise.

G. Torrington Did Not Exhaust Its Administrative Remedies by Applying for a Scope Inquiry Regarding INA Steering Column Supports.

Commerce excluded INA's steering column supports from the scope of the antidumping order covering cylindrical roller bearings from Germany. Torrington asserts that Commerce's failure to initiate a scope inquiry was contrary to law; alternatively, Torrington argues that Commerce's determination that the steering column supports were outside the scope of the order was not supported by substantial evidence or in accordance with law.

Under 19 C.F.R. § 351.225(b), Commerce is obligated to self-initiate a scope inquiry only when, based on the available information, it cannot determine whether a product is included within the scope of an order. Commerce argues that it was able to make a decision as to the scope based on the available product descriptions, and therefore, was not obligated to self-initiate a scope inquiry.

Torrington, however, did not have to rely on Commerce's judgment. If Torrington was not satisfied with Commerce's decision on the matter, the regulations also provide that any interested party may request a scope inquiry as provided by 19 C.F.R. § 351.225(c)(1). Although Torrington "vigorously contested Commerce' [sic] determination to accept INA's exclusion of the product based on its informal inquiry," Torrington did not formally apply for a scope inquiry. The Torrington Company's Reply Brief at 3. As a result, because it failed to apply for a ruling as permitted by the regulations, Torrington failed to exhaust its administrative remedies.

Whenever warranted, the Court is obligated to require the exhaustion of administrative remedies before an issue can be properly addressed here. 28 U.S.C. § 2637(d). The "detailed scope determination procedures that Commerce has provided constitute precisely the kind of administrative remedy that must be exhausted before a party may litigate the validity of the administrative action." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599-600 (Fed.Cir.1998).

Accordingly, because Torrington did not exhaust its administrative remedies by applying for a scope inquiry, the Court does not have jurisdiction to address the issue of whether certain cylindrical bearings fell within the scope of the antidumping order.

H. Commerce's Acceptance of Koyo's Method of Calculating Air and Ocean Freight Expenses Is Supported by Substantial Evidence and Otherwise In Accordance With Law.

Torrington challenges Commerce's acceptance of Koyo's method of calculating air and ocean freight expenses. Koyo calculated a single international freight expense factor by weight, using the aggregate expenses for both air and ocean freight divided by the total weight of all bearings shipped to the United States. Torrington argues that Koyo could and

should have either reported its international freight expenses on a transaction-specific basis or separately reported air and ocean freight expenses, allocating the air freight expenses in a more specific manner. The Torrington Company's Memorandum In Support Of Its Rule 56.2 Motion For Judgment Upon the Agency Record ("Torrington Br.") at 56. Torrington claims that Koyo's allocation method led to significant inaccuracies. According to Torrington, accurate reporting of air freight expenses would decrease U.S. prices and therefore increase Koyo's dumping margins. *Id.* at 69.

19 U.S.C. § 1677a(c)(2)(A) provides for an adjustment to EP or CEP for the amount attributable to any costs incident to bringing subject merchandise into the United States. Pursuant to § 1677a(c)(2)(A), Commerce deducts air and ocean freight costs. Commerce "may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided . . . that the allocation method used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(1). A party seeking to submit allocated expenses and price adjustments must demonstrate "that the allocation is calculated on as specific a basis as feasible and must explain why their allocation methodology used does not cause inaccuracies." 19 C.F.R. § 351.401(g)(2).

At issue here is whether Koyo was capable of reporting its air freight expenses in a more specific manner. Torrington claims that since Koyo only shipped via air freight on an emergency basis to deal with low inventories, it would not have been infeasible for Koyo to have reported transaction-specific air freight expenses. *See* Torrington Br. at 64. Koyo responds that this would not have been feasible because it did not possess records that would allow the linkage of units shipped by air to specific sales in the United States. *See Memorandum of Koyo Seiko Co., Ltd. and Koyo Corporation U.S.A. in Response to Torrington's Motion for Judgment on the Agency Record* ("Koyo Resp. Br.") at 15.

To require Koyo to submit more specific air and ocean freight expenses, Torrington must first establish linkage between the shipments and specific sales in the United States. *See Torrington Co. v. United States*, 21 CIT 491, 498, 965 F.Supp. 40, 45 (1997) (respondent's reporting methodology is permissible because "[t]he documents cited by Torrington do not provide a means of linking individual sales to specific shipments"). Torrington does not adequately demonstrate such linkage based upon documents on the record. Torrington erroneously focuses on how Koyo *could have* documented its shipments in a manner that would allow for more specific reporting of its international freight expenses. Torrington's argument is misplaced as § 351.401(g)(1) refers to the feasibility of using existing documents to use transaction-specific reporting—*not* the feasibility of maintaining records that would allow such reporting. *See also* 19 U.S.C. § 351.401(g)(3) (Commerce must consider "the records maintained by the party in question in the ordinary course of business"). Nothing suggests that companies are required to make wholesale changes to their record-keeping practices to comply with § 351.401(g)(1).

The Court must also determine whether Commerce adequately investigated Koyo's proposed methodology to determine whether it was reasonable and representative. *See Torrington Co. v. United States*, 21 CIT 686, 695, 969 F.Supp. 1332, 1339 (1997). Commerce has the authority to accept averages rather than transaction-specific data "as long as the methodology chosen by a respondent is reasonable and supported by information contained in the administrative record." *Torrington*, 21 CIT at 497, 969 F.Supp. 45. As part of the sixth administrative review, Commerce verified Koyo's reporting methodology. By tracing data from freight invoices to reports provided by freight carriers, Commerce determined that it did accurately represent Koyo's shipping expenses. There is nothing in the record that demonstrates Koyo has

altered its methodology since Commerce conducted its inquiry in the sixth administrative review.

Accordingly, Commerce's acceptance of Koyo's method of calculating air and ocean freight expenses is sustained.

I. Commerce's Treatment of NTN's Sales to Affiliated Parties Is Supported By Substantial Evidence.

In the *Final Results*, Commerce applied the arm's length test to NTN's sales to affiliated parties. Torrington challenges Commerce's decision on two separate grounds: (1) that Commerce erred in not applying facts available to NTN's affiliates and (2) that Commerce improperly disregarded certain downstream sales in its calculation of normal value.

Torrington argues that when calculating normal value, Commerce erred by relying on sales figures to affiliates as reported by NTN rather than on downstream sales or facts available. Although downstream sales may be used to calculate normal value when the foreign like product is sold to an affiliated party, Commerce may not rely on downstream sales if the "arm's length" test is satisfied. 19 C.F.R. § 351.403(c). Commerce explained that a model-specific comparison of sales to affiliated and unaffiliated parties showed that sales to affiliated parties were an average of 99.5 percent or more of the price of sales to unaffiliated parties. As a result of this comparison, Commerce concluded that NTN's sales to affiliated parties satisfied the arm's length test and therefore formed a reasonable basis for calculating normal value. *See* Issues and Decision Memo at Comment 25. Therefore, according to Commerce, it was unnecessary to rely on downstream sales or facts available when calculating normal value.

Torrington points out, however, that Commerce has recognized that the 99.5 percent arm's length test is not the sole method for dealing with the issue of sales to affiliated parties. *See* Torrington Br. at 46 (citing *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed.Reg. 27296, 27355

(May 19, 1997)). However, Torrington fails to point out that in the next sentence Commerce announced that it will "continue to apply the current 99.5 percent test unless and until [it] develop[s] a new method." *Id.* Commerce found that this 99.5 percent arm's length test was suitable and that it was satisfied. Acting in accordance with 19 C.F.R. § 351.403(c), Commerce did not err in relying on NTN's reported sales figures rather than on downstream sales or facts available when calculating normal value.

In prior reviews and the preliminary results of this administrative review, NTN's failure to supply all downstream sales through affiliated resellers resulted in Commerce's application of adverse facts available in its calculation of normal value. Commerce did not, however, apply adverse facts available in the *Final Results*. Issues and Decision Memo at Comment 2. Citing *Queen's Flowers de Colombia v. United States*, 21 CIT 968, 981 F.Supp. 617 (1997), Torrington points out that an agency is required either to conform to its prior decisions or to explain the reasons for its departure. As a result, Torrington argues that Commerce's failure to use adverse facts in the *Final Results*, without providing an explanation of its reasoning, requires the issue to be remanded for further explanation.

Commerce argues that its previous decisions are not binding. In addition, Commerce concluded in the *Final Results* that because NTN's reported sales satisfied the arm's length test they provided Commerce with a reasonable basis for calculating normal value. Therefore, according to Commerce, it can hardly be said that Commerce failed to comply with its prior decisions.

Commerce may, but is not required to, apply adverse facts when "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). Given Commerce's satisfaction with NTN's compliance with requests for addi-

tional information and explanations and Commerce's reasonable conclusion that it had sufficient information to calculate normal value, Commerce is not compelled to use adverse facts available. Because Commerce is not bound by prior decisions based on different facts and because applying adverse facts available in the case at hand is unwarranted, the Court holds that there is no basis for remanding this issue for further clarification.

As to the second issue, Commerce claims that it was unable to use downstream sales data for sales to affiliates that did not satisfy the arm's length test because matching downstream figures were unavailable. Def.'s Br. at 75. Torrington argues that this is not supported by the evidence and that Commerce's failure to request the allegedly missing data constitutes a blatant abrogation of its statutory duty to conduct an adequate investigation. *See Freeport Minerals Co. v. United States*, 776 F.2d 1029 (Fed.Cir.1985). Upon reviewing the record, the Court holds that Commerce did not err by deciding not to use [sic] certain downstream sales data. Commerce's decision not use these downstream sales is in accordance with 19 U.S.C. § 1677(16), which states that Commerce is not required to "obtain information on all possible sales of the foreign like product." Furthermore, Commerce exercised its discretion pursuant to 19 C.F.R. § 351.403(c), which states that "[i]f an importer or producer sold the foreign like product through an affiliated party, the Secretary *may* calculate normal value based on such sale by the affiliated party." Commerce, after reviewing the record evidence, concluded that it was not "necessary or appropriate to require the reporting of [downstream sales] . . . in all instances." *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed.Reg. at 27356.

Accordingly, Commerce's treatment of NTN's sales to affiliated parties is sustained.

III. *CONCLUSION*

For the aforementioned reasons, the *Final Results* is sustained in part and reversed and remanded in part.

A separate order will be issued accordingly.

APPENDIX C

NOTICES

DEPARTMENT OF COMMERCE

International Trade Administration

[A-427-801, A-428-801, A-475-801, A-588-804, A-401-801, A-412-801]

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part

Thursday, July 12, 2001

For a complete version of this memorandum, see 66 ITADOC 36551.

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part.

SUMMARY: On February 5, 2001, the Department of Commerce published the preliminary results of the administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom. The merchandise covered by these orders are ball bearings and parts thereof, cylindrical roller bearings and parts thereof, and spherical plain bearings and parts thereof. The reviews cover 56 manufacturers/exporters. The periods of review are May 1, 1999, through April 30, 2000, for ball bearings and May 1, 1999, through December 31, 1999, for cylindrical roller bearings and spherical plain bearings.

Based on our analysis of the comments received, we have made changes, including corrections of certain programming and other clerical errors, in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled "Final Results of the Reviews."

EFFECTIVE DATE: July 12, 2001.

FOR FURTHER INFORMATION: Please contact the appropriate case analysts for the various respondent firms as listed below, at Import Administration, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230; telephone: (202) 482-4733.

France

Edythe Artman (SNFA), George Callen (SNR), Lyn Johnson (Alfateam—Belgium, Alfa-Team—Germany, Bearing Discount—Germany, Motion Bearings—Singapore, Yoo Shin—South Korea, Rodamientos Rovi—Venezuela, Rovi-Valencia—Venezuela, Rovi-Maracay—Venezuela, RIRSA—Mexico, DCD—Northern Ireland, Euro-Latin—United Kingdom (collectively, Resellers)), David Dirstine, or Richard Rimlinger.

Germany

George Callen (Cerobear), Hermes Pinilla (INA), Thomas Schauer (Torrington Nadellager), Lyn Johnson (Resellers), David Dirstine, or Richard Rimlinger.

Italy

Lyn Johnson (Resellers) or David Dirstine.

Japan

Minoo Hatten (NSK), Thomas Schauer (NTN), Lyn Johnson (Koyo), David Dirstine, or Richard Rimlinger.

Sweden

Lyn Johnson (Resellers) or David Dirstine.

United Kingdom

Thomas Schauer (Timken, RHP/NSK), Dimitry Vladimirov (SNFA), David Dirstine, or Richard Rimlinger.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department's) regulations are to 19 CFR Part 351 (2000).

Background

On February 5, 2001, the Department published the preliminary results of the administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom (66 FR 8931). The reviews cover 56 manufacturers/exporters. The periods of review (POR) are May 1, 1999, through April 30, 2000, for ball bearings and May 1, 1999, through December 31, 1999, for cylindrical roller bearings and spherical plain bearings. We invited interested parties to comment on our preliminary results. At the request of certain parties, we held hearings for Germany-specific issues and reseller issues for France, Germany, Sweden and Italy on March 22, 2001, and for Japan-specific issues on March 26, 2001. The Department has conducted these administrative reviews in accordance with section 751 of the Act.

Scope of the Orders

The products covered by these orders, antifriction bearings (other than tapered roller bearings), mounted or unmounted, and parts thereof, constitute the following classes or kinds of merchandise:

1. *Ball Bearings and Parts Thereof:* These products include all antifriction bearings that employ balls as the rolling element. Imports of these products are classified under the following categories: antifriction balls, ball bearings (BBs) with integral shafts, BBs (including radial BBs) and parts thereof, and housed or mounted BB units and parts thereof.

Imports of these products are classified under the following Harmonized Tariff Schedules of the United States (HTSUS) subheadings: 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.2580, 8482.99.35, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.70.6060, 8708.70.8050, 8708.93.30, 8708.93.5000, 8708.93.6000, 8708.93.75, 8708.99.06, 8708.99.31, 8708.99.4960, 8708.99.50, 8708.99.5800, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

2. *Cylindrical Roller Bearings, Mounted or Unmounted, and Parts Thereof:* These products include all antifriction bearings that employ cylindrical rollers as the rolling element. Imports of these products are classified under the following categories: antifriction rollers, all cylindrical roller bearings (including split cylindrical roller bearings) (CRBs) and parts thereof, and housed or mounted CRB units and parts thereof.

Imports of these products are classified under the following HTSUS subheadings: 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010,

8482.40.00, 8482.50.00, 8482.80.00, 8482.91.00, 8482.99.25, 8482.99.35, 8482.99.6530, 8482.99.6560, 8482.99.70, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.93.5000, 8708.99.4000, 8708.99.4960, 8708.99.50, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

3. *Spherical Plain Bearings, Mounted and Unmounted, and Parts Thereof:* These products include all spherical plain bearings (SPBs) that employ a spherically shaped sliding element and include spherical plain rod ends.

Imports of these products are classified under the following HTSUS subheadings: 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.50.10, 8483.30.80, 8483.90.30, 8485.90.00, 8708.93.5000, 8708.99.50, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

The HTSUS item numbers are provided for convenience and customs purposes. They are not determinative of the products subject to the orders. The written descriptions remain dispositive.

Size or precision grade of a bearing does not influence whether the bearing is covered by one of the orders. These orders cover all the subject bearings and parts thereof (inner race, outer race, cage, rollers, balls, seals, shields, etc.) outlined above with certain limitations. With regard to finished parts, all such parts are included in the scope of these orders. For unfinished parts, such parts are included if (1) they have been heat-treated, or (2) heat treatment is not required to be performed on the part. Thus, the only unfinished parts that are not covered by these orders are those that will be subject to heat treatment after importation. The ultimate application of a bearing also does not influence whether the bearing is covered by the orders. Bearings designed for highly specialized applications are not excluded. Any of the subject bear-

ings, regardless of whether they may ultimately be utilized in aircraft, automobiles, or other equipment, are within the scopes of these orders.

For a listing of scope determinations which pertain to the orders, see the "Scope Determinations Memorandum" (Scope Memo) from the Antifriction Bearings Team to Laurie Parkhill, dated May 11, 2001. The Scope Memo is on file in the Central Records Unit (CRU), Main Commerce Building, Room B-099.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to these concurrent administrative reviews of the orders on antifriction bearings are addressed in the "Issues and Decision Memorandum" (Decision Memo) from Richard W. Moreland, Deputy Assistant Secretary, to Faryar Shirzad, Assistant Secretary, dated June 5, 2001, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memo, is attached to this notice as an Appendix. This Decision Memo, which is a public document, is on file in the CRU, Main Commerce Building, Room B-099, and is accessible on the Web at ia.ita.doc.gov. The paper copy and electronic version of the Decision Memo are identical in content.

Sales Below Cost in the Home Market

The Department disregarded home-market sales that failed the cost-of-production test for the following firms and classes or kinds of merchandise for these final results of reviews:

Country	Company	Subject merchandise
France	SNR	BBs
Germany	INA	CRBs
Japan	Koyo	BBs, CRBs

	NSK	BBs, CRBs
	NTN	BBs, CRBs, SPBs
United Kingdom	NSK-RHP	BBs

Partial Revocation of the Orders

In the preliminary results we stated our intent to revoke the order covering CRBs from France as it pertains to the sales of these bearings by SNFA France (66 FR at 8934). However, the order on CRBs from France was revoked on January 1, 2000, pursuant to a sunset review decision of the International Trade Commission under section 751(c) of the Act (see *Revocation of Antidumping Duty Orders on Certain Bearings From Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom*, 65 FR 46267 (July 11, 2000) (*Sunset Revocation Notice*)). Therefore, there is no need for us to rule on this matter in the context of this particular review.

In addition, also in our preliminary results, we stated our intent not to revoke the order covering BBs from the United Kingdom as it pertained to sales of these bearings by SNFA U.K. However, due to a recalculation of SNFA U.K.'s margin as the result of clerical errors in our preliminary calculations (see Post-Preliminary Disclosure Memo from Laurie Parkhill to Richard Moreland, dated May 4, 2001), the final margin for SNFA U.K. is zero, and we are revoking this order in part with respect to SNFA U.K. The revocation in part applies to subject merchandise entered, or withdrawn from warehouse, for consumption on or after May 1, 2000.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made revisions that have changed the results for certain firms. We have corrected programming and clerical errors in the preliminary results, where applicable. Any alleged program-

ming or clerical errors about which we or the parties do not agree are discussed in the relevant sections of the Decision Memo, which is accessible on the Web at ia.ita.doc.gov and is on file in the CRU, Room B-099.

Final Results of Reviews

We determine that the following percentage weighted-average margins exist for the period May 1, 1999, through April 30, 2000 (for BBs), and for the period May 1, 1999, through December 31, 1999 (for CRBs and SPBs):

Company	Ball	Cylindrical	Spherical plain
France:			
SNFA	([3])	0.00	
SNR	1.64	([3])	
Alfateam	66.18	([3])	
Alfa-Team	66.18	([3])	
Bearing Discount	([2])	([3])	
Motion Bearings	66.18	([3])	
Yoo Shin	66.18	([3])	
Rodamientos Rovi	([2])	([3])	
Rovi-Valencia	([2])	([3])	
Rovi-Maracay	([2])	([2])	([3])
RIRSA	([2])	([3])	
DCD	66.18	([3])	
Euro-Latin	([2])	([3])	

Germany:			
Cerobear	0.03	0.00	(3)
INA	(1)	2.96	(1)
Torrington Nadellager	1.22	61.60	(3)
Alfateam	70.41	61.60	(3)
Alfa-Team	70.41	61.60	(3)
Bearing Discount	(2)	(2)	(3)
Motion Bearings	70.41	61.60	(3)
Yoo Shin	70.41	61.60	(3)
Rodamientos Rovi	(2)	(2)	(3)
Rovi-Valencia	(2)	(2)	(3)
Rovi-Maracay	(2)	(2)	(3)
RIRSA	(2)	(2)	(3)
DCD	70.41	61.60	(3)
Euro-Latin	(2)	(2)	(3)
Italy:			
Alfateam	68.29		
Alfa-Team	68.29		
Bearing Discount	(2)		
Motion Bearings	68.29		
Yoo Shin	68.29		

Rodamientos Rovi	(2)		
Rovi-Valencia	(2)		
Rovi-Maracay	(2)		
RIRSA	(2)		
DCD	68.29		
Euro-Latin	(2)		
Japan:			
Koyo	10.10	5.28	0.00
NSK Ltd	4.22	5.74	(3)
NTN	9.16	16.26	3.60
Sapporo	73.55	(3)	(3)
Sweden:			
Alfateam	13.55		
Alfa-Team	13.55		
Bearing Discount	(2)		
Motion Bearings	13.55		
Yoo Shin	13.55		
Rodamientos Rovi	(2)		
Rovi-Valencia	(2)		
Rovi-Maracay	(2)		
RIRSA	(2)		
DCD	13.55		

Euro-Latin	(2)
United Kingdom:	
NSK/RHP	15.65
SNFA	0.00
Timken	1.11

1 No shipments or sales subject to this review. The deposit rate remains unchanged from the last relevant segment of the proceeding in which the firm had shipments/sales.

2 No shipments or sales subject to this review. The firm has no individual rate from any segment of this proceeding.

3 No request for review under section 751(a) of the Act.

Resellers

With respect to Bearing Discount International, Euro-Latin Export Services Limited, Representaciones Industriales Rodriquez, S.A. de C.V., Rodamientos Rovi C.A., Rovi-Maracay, and Rovi-Valencia, we have determined that these respondents had no shipments during the POR. We have based our determination on letters from these respondents indicating that they had no shipments and on our examination of the Customs Service database for imports of entered merchandise involving these respondents. Based upon the record and our methodology of reviewing Customs Service information, we have determined that the respondents at issue had no shipments during the POR, and we have not established margins for use as future cash-deposit rates.

As explained in the accompanying Decision Memorandum, however, notwithstanding their letters reporting that they had made no shipments, it is impossible to establish with certainty from Customs Service data the accuracy of their statements. Therefore, we will instruct the Customs Service at the time of liquidation to review all documentation for suspended entries

of subject merchandise. If the Customs Service finds that any of the six "no-shipment" respondents in fact had shipments of subject merchandise during the POR, we will instruct the Customs Service to apply a facts-available rate to such respondents based on the adverse facts-available rate we have determined for the applicable country of origin (France, Germany, Italy, or Sweden) and subject merchandise. See Preliminary Results, 66 FR 8933, for a description of our determination of these rates.

Assessment Rates

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated, whenever possible, an exporter/importer-specific assessment rate or value for subject merchandise.

a. Export Price

With respect to export-price (EP) sales for these final results, we divided the total dumping margins (calculated as the difference between normal value (NV) and EP) for each importer/customer by the total number of units sold to that importer/customer. We will direct the Customs Service to assess the resulting per-unit dollar amount against each unit of merchandise on each of that importer's/customer's entries under the relevant order during the review period.

b. Constructed Export Price

For constructed-export-price (CEP) sales (sampled and non-sampled), we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. When an affiliated party acts as an importer for export-price sales we have included the applicable export-price sales in the assessment-rate calculation. We will direct the Customs Service to assess the resulting percentage margin against the entered customs values for the

subject merchandise on each of that importer's entries under the relevant order during the review period (see 19 CFR 351.212(a)).

Cash-Deposit Requirements

To calculate the cash-deposit rate for each respondent (i.e., each exporter and/or manufacturer included in these reviews), we divided the total dumping margins for each company by the total net value for that company's sales of merchandise during the review period subject to each order.

In order to derive a single deposit rate for each order for each respondent, we weight-averaged the EP and CEP deposit rates (using the export price and CEP, respectively, as the weighting factors). To accomplish this when we sampled CEP sales, we first calculated the total dumping margins for all CEP sales during the review period by multiplying the sample CEP margins by the ratio of total days in the review period to days in the sample weeks. We then calculated a total net value for all CEP sales during the review period by multiplying the sample CEP total net value by the same ratio. We then divided the combined total dumping margins for both export-price and CEP sales by the combined total value for both export-price and CEP sales to obtain the deposit rate.

We will direct the Customs Service to collect the resulting percentage deposit rate against the entered customs value of each of the exporter's entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. If an order has been revoked in full or in part, cash deposits will not be required on entries made after the effective date of the revocation, identified in the *Revocation* section above.

Entries of parts incorporated into finished bearings before sales to an unaffiliated customer in the United States will receive the respondent's deposit rate applicable to the order.

Furthermore, the following deposit requirements will be effective upon publication of this notice of final results of administrative reviews for all shipments of antifriction bearings entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act unless the order has been revoked in full (see *Sunset Revocation Notice*) or in part (see *Revocation* section above): (1) the cash-deposit rates for the reviewed companies will be the rates shown above except that, for firms whose weighted-average margins are less than 0.5 percent and therefore de minimis, the Department shall not require a deposit of estimated antidumping duties; (2) for previously reviewed or investigated companies not listed above, the cash-deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash-deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash-deposit rate for all other manufacturers or exporters will continue to be the "All Others" rate for the relevant order made effective by the final results of review published on July 26, 1993 (see *Antifriction Bearings (Other Than Tapered Roller Bearings) and* Parts Thereof From France, et al: Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order, 58 FR 39729 (July 26, 1993), and, for BBs from Italy, see *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al: Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 61 FR 66472 (December 17, 1996)). These rates are the "All Others" rates from the relevant LTFV investigation.

These deposit requirements shall remain in effect until publication of the final results of the next administrative reviews.

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during these review periods. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these determinations and notice in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.210(c).

Dated: July 5, 20002.

Faryar Shirzad,
Assistant Secretary for Import Administration.

Appendix

Comments and Responses

1. Facts Available
2. CEP Profit
3. Price Adjustments
   A. Inventory Carrying Costs
   B. Commissions
   C. Bank Charges
   D. Other Direct Selling Expenses
   E. Other
4. Resellers
5. Level of Trade
6. Arm's-Length Test
7. Prototypes and Sales Outside the Ordinary Course of Trade
8. Further Manufacturing
9. Cost of Production and Constructed Value
   A. Profit for Constructed Value
   B. Affiliated-Party Inputs
   C. When to Use CV
10. Packing and Movement Expenses
11. Miscellaneous
    A. Clerical Errors
    B. Scope
    C. Other

[FR Doc. 01-17486 Filed 7-11-01; 8:45 am]

BILLING CODE 3510-DS-P

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

05-1297, 05-1323

SNR ROULEMENTS,

Plaintiff,

and

KOYO SEIKO CO., LTD. and KOYO CORPORATION OF U.S.A.,

Plaintiffs-Appellants,

and

NSK CORPORATION, NSK BEARINGS EUROPE, LTD., and NSK LTD.,

Plaintiffs,

and

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN-DRIVESHAFT, INC., and NTN BOWER CORPORATION,

Plaintiffs-Appellants,

and

NTN-BCA CORPORATION,

Plaintiff,

and

INA SCHAEFFLER KG and INA USA CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee,

and

THE TORRINGTON COMPANY
(now known as Timken US Corporation),
Defendant-Appellee.

February 6, 2007, Decided
February 6, 2007, Filed

THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NON-PRECEDENTIAL OPINIONS OR ORDERS.

Before Rader, *Circuit Judge*, Archer, *Senior Circuit Judge*, and Prost, *Circuit Judge*.

ORDER

A petition for rehearing having been filed by the Appellants, UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on February 13, 2007.

APPENDIX E

WORLD TRADE ORGANIZATION

WT/DS322/AB/R
9 January 2007
(07-0081)

Original: English

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

AB-2006-5

Report of the Appellate Body

* * * *

I. Introduction

1. Japan and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews* (the "Panel Report").[1] The Panel was established to consider a complaint by Japan concerning the calculation of margins of dumping by the United States based on a methodology that disregards the amounts by which the export prices are above the normal value in certain transactions.[2]

* * * *

V. Zeroing As Such in Original Investigations, Periodic Reviews, and New Shipper Reviews

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[1] WT/DS322/R, 20 September 2006.

[2] See Panel Report, paras. 2.1 and 7.1. The Panel noted that, "with regard to periodic reviews and new shipper reviews, Japan challenges zeroing not only with respect to the calculation of *margins of dumping* but also with respect to the calculation of *assessment rates*." (Panel Report, footnote 630 to para. 7.1) (original emphasis).

* * * *

B. *Determination of Margins of Dumping Based on Transaction-to-Transaction Comparisons in Original Investigations*

1. Article 2.4.2 of the *Anti-Dumping Agreement*

* * * *

(c) Conclusion

137. In the light of our analysis of Article 2.4.2 of the *Anti-Dumping Agreement*, we conclude that, in establishing "margins of dumping" under the T-T comparison methodology, an investigating authority must aggregate the results of all the transaction-specific comparisons and cannot disregard the results of comparisons in which export prices are above normal value.[334]

138. Accordingly, we *reverse* the Panel's finding, in paragraphs 7.143 and 7.259(a) of the Panel Report, that the United States does not act inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of T-T comparisons in original investigations, and *find*, instead, that the United States acts inconsistently with that provision.

* * * *

C. *Zeroing As Such in Periodic Reviews and New Shipper Reviews*

* * * *

1. Articles 9.3 and 9.5 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994

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[334] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 122.

* * * *

(c) New Shipper Reviews

* * * *

166. In the light of these considerations, we *reverse* the Panel's finding, in paragraphs 7.222 and 7.259(b) of the Panel Report, that the United States does not act inconsistently with Articles 9.3 and 9.5 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews and new shipper reviews, and *find*, instead, that the United States acts inconsistently with these provisions.

* * * *

VI. Zeroing As Applied in Periodic Reviews

* * * *

176. For these reasons, we *reverse* the Panel's finding, in paragraphs 7.227 and 7.259(c) of the Panel Report, that zeroing, as applied by the United States in the 11 periodic review determinations at issue in this appeal, is not inconsistent with Articles 2.1, 2.4, 9.1, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and *find*, instead, that the United States acted inconsistently with its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

* * * *

Signed in the original in Geneva this 14th day of December 2006 by:

_____

Giorgio Sacerdoti
Presiding Member

Georges Abi-Saab Member	A.V. Ganesan Member

APPENDIX F

WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/226
26 March 2007

(07-1261)

Dispute Settlement Body
20 February 2007

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 February 2007

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

* * * *

2. United States – Measures relating to zeroing and sunset reviews

(a) Implementation of the recommendations of the DSB

* * * *

31. The representative of the *United States* said that his country recognized that anti-dumping was a complicated area and that the issue of "zeroing" was also complex. There was nothing in the WTO Agreements that mentioned or addressed "zeroing." And as the Appellate Body had made clear in the past, the best indicator of the intent of the negotiators was the text itself. However, in this dispute the Appellate Body had appeared to be trying to infer the intent of Members with respect to the issue of "zeroing" without the benefit of a textual basis. It was no surprise then that an interpretive approach, based not on agreed text but on inference, should raise a number of problems, both legal and practical.

32. The United States had provided for the convenience of Members a written explanation of its objections to the Appellate Body report.[1] For the reasons discussed at the 23 January 2007 DSB meeting and in the communication distributed at the present meeting, the United States considered that the Appellate Body's findings relating to zeroing outside the context of average-to-average comparisons in investigations were devoid of legal merit. And with regard to findings on that limited context, the United States referred Members to its past statements indicating that those findings were not beyond serious criticism.

33. Wholly apart from their legal shortcomings, the Appellate Body's findings suggested forms of implementation that simply made no sense from a policy perspective. For example, the Appellate Body had found that dumping duties might not be calculated and assessed on an import-specific basis, but must instead be calculated for all the merchandise of an exporter or producer. These findings suggested that importers of higher-priced merchandise not responsible for dumping must be penalized, either by seeing anti-dumping duties reduced for their competitors who imported the lower priced merchandise responsible for the dumping, or by themselves paying anti-dumping duties because of their competitors' conduct.

34. It was difficult to conclude that Members agreed upon such an illogical outcome. The text did not support such a conclusion, nor did the actions of the Members following the completion of the text. As was well known, all the major users of the anti-dumping instrument continued to zero following the implementation of the Anti-Dumping Agreement. Even after the Appellate Body reports on zeroing in the average-to-average context, eight of nine impartial anti-dumping experts agreed that the text did not prohibit zeroing beyond that context. Were this a municipal court result, such

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[1] Subsequently circulated in document WT/DS322/16.

an illogical outcome would be a prime candidate for reconsideration by the legislative branch. That was no less the case here, and the United States submitted that Members take up this issue, which affected the anti-dumping systems of a number of Members, in the Rules negotiations. Having said that, the United States wished to state that it intended to comply in this dispute with its WTO obligations and would be considering carefully how to do so. The United States would need a reasonable period of time.

* * * *

APPENDIX G

WORLD TRADE ORGANIZATION

WT/DS322/20
8 May 2007

(07-1900)

Original: English

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

Agreement under Article 21.3(b) of the DSU

The following communication, dated 4 May 2007, from the delegation of the United States and the delegation of Japan to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 21.3(b) of the DSU.

The Representatives of the United States of America and Japan wish to inform you that, pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), the United States and Japan have mutually agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute "*United States – Measures Relating to Zeroing and Sunset Reviews*" (WT/DS322) shall be 11 months, expiring on 24 December 2007.

In addition, we wish to inform you that, in light of our agreement, Japan no longer seeks to have the reasonable period of time determined through a binding arbitration pursuant to Article 21.3(c) of the DSU. We wish to extend our appreciation and thanks to the arbitrator for his efforts in this proceeding.

We request that you circulate this notification to the Members of the DSB.

For the United States of America

Peter F. Allgeier
Ambassador

For Japan

Ichiro Fujisaki
Ambassador

APPENDIX H

UNITED STATES – SECTION 129(c)(1) OF THE URUGUAY ROUND AGREEMENTS ACT

(WT/DS221)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

March 8, 2002

* * * *

I. Canada Has Failed to Establish that Section 129(c)(1) of the URAA Mandates a Breach of U.S. Obligations Under the AD Agreement, the SCM Agreement, or GATT 1994

* * * *

B. The Meaning of Section 129(c)(1) Is a Factual Question That Must Be Answered by Applying U.S. Principles of Statutory Interpretation

10. The United States has argued at length in its first written submission, in its oral statement at the first Panel meeting, and in its answers to the Panel's questions, that section 129(c)(1) does not breach WTO rules because "prospective" implementation in WTO disputes involving antidumping and countervailing duty measures requires a Member to ensure that the new determination applies to all merchandise that enters for consumption on or after the date of implementation. However, even if Canada were correct in arguing that date of entry is not the controlling issue, section 129(c)(1) can violate WTO rules only if it *mandates* the actions that Canada alleges. If it does not do so, then Canada's claims must fail, regardless of what it means to implement a new determination in a WTO-consistent manner.

11. It is well-established that municipal law consists not only of the provisions being examined, but also domestic

legal principles that govern the interpretation of those provisions.[8] While the Panel is not bound to accept the interpretation presented by the United States, the United States believes that the Panel should give considerable deference to the United States' views on the meaning of its own law.[9]

12. For purposes of ascertaining the meaning of section 129(c)(1) as a matter of U.S. law, U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States."[10]

C. Canada's Arguments Fail to Establish that Section 129(c)(1) Mandates Action Inconsistent with WTO Rules

13. Canada makes a number of arguments regarding why section 129(c)(1) allegedly breaches various provisions of the AD Agreement, the SCM Agreement, and GATT 1994. Each of the arguments is a variant on a common theme, and each arises from a common assumption. To quote Canada's response to a question from the Panel:

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[8] *See, e.g.*, Panel Report on *United States – Section 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.108 & n. 681 ("*U.S. 301*").

[9] *U.S. 301*, para. 7.19.

[10] *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (Exhibit U.S.-11); and *U.S. 301*, note 681, in which the panel recognized the existence of what is known in the United States as "the *Charming Betsy* doctrine".

> The language of section 129(c)(1), by limiting compliance to future entries, has the effect of precluding the Department of Commerce from taking action to comply with the DSB ruling with respect to prior unliquidated entries. As Canada understands U.S. law, section 129(c)(1) would be interpreted this way because otherwise the express limitation to future entries contained in that section would be meaningless. The language of section 129(c)(1) precludes the Department of Commerce from applying the determination to prior unliquidated entries.
>
> Since Section 129(c)(1) directs the Department to apply a new WTO-consistent determination to all unliquidated entries entered on or after a particular date, section 129(c)(1) precludes the Department of Commerce from applying the new determination to unliquidated duties made prior to the particular date. That is, the use of the word "after" in section 129(c)(1) excludes any interpretation that would allow the Department of Commerce to apply the new determination to prior entries. Thus, by virtue of U.S. statutory interpretation and administrative law principles, the Department is precluded from applying the new determination to prior unliquidated entries.[11]

14. Canada's assumption, however, is not correct. Canada's error arises from a mistaken interpretation of the term "determination" as that term is used in section 129(c)(1). As the United States explains below, when the term is properly understood, it becomes clear that Canada's claims and arguments do not establish that section 129(c)(1) mandates WTO-inconsistent action.

15. Section 129(c)(1) states in its entirety:

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[11] Canada's Responses to Questions, paras. 48, 49.

(c) *Effects of Determinations; Notice of Implementation.*—

(1) *Effects of determinations.*—Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—

(A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

16. As the text demonstrates, the scope of section 129(c)(1) is actually quite limited. It only addresses the treatment of entries that take place on or after the date of implementation, and even then, it only addresses the application of the *particular determination issued under the authority of section 129(c)(1)* to those entries. It does not address what actions Commerce may or may not take in a *separate* determination in a *separate* segment of the proceeding (*i.e.*, any separate review of the order), and thus does not mandate that Commerce take (or preclude Commerce from taking) any particular action in any separate segment of the proceeding.[12]

---

[12] Section 351.102 of Commerce's regulations defines a segment of a proceeding as follows:

17. As the United States discussed in response to question 46 from the Panel, this point can be illustrated by considering the case of a challenge to a Commerce Department final dumping determination in an investigation. If the challenge were successful, Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent determination.[13] It would then apply that new determination by setting a new cash deposit rate, which would apply to all entries that took place on or after the implementation date. It is this new determination that is the "determination" referenced in section 129(c)(1).

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(1) *In general.* An antidumping or countervailing duty proceeding consists of one or more *segments*. "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.

(2) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

[13] Section 129(c)(1) does not preclude USTR from directing implementation prior to the end of the reasonable period of time, and it does not preclude Commerce from implementing within the reasonable period of time. In both applications of section 129(c)(1) to date, USTR has directed implementation, and Commerce has implemented, before the end of the reasonable period of time. *See United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Status Report by the United States*, WT/DS99/6, 17 January 2000, paras. 4, 8, 10 (explaining that USTR issued its request in the *DRAMS* case on August 2, 1999, that Commerce issued its new determination on November 4, 1999, and that the reasonable period of time expired on November 19, 1999) (Exhibit US-12); *see also* Exhibit US-9 (explaining that USTR issued its request in the *Stainless Steel* case on April 18, 2001 and that Commerce issued its new determination on August 28, 2001); *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, Agreement Under Article 21.3(b) of the DSU*, WT/DS179/5, 1 May 2001 (explaining that the reasonable period of time in the *Stainless Steel* case expired on September 1, 2001) (Exhibit US-13).

18. If a company were then to request an administrative review of what Canada terms "prior unliquidated entries," Commerce would conduct the administrative review and issue a new determination. Since the administrative review determination would not be the "determination implemented under section 129(c)(1)," nothing in section 129(c)(1) would preclude Commerce from applying its new, WTO-consistent methodologies in the administrative review.[14] Canada is simply wrong to claim that section 129(c)(1) would preclude Commerce from doing so.

19. The second scenario that Canada has raised is a situation where the WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTO-consistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.

20. Canada has not challenged an actual application of section 129(c)(1) in such a scenario, and Commerce has not

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[14] As Canada argued in the first Panel meeting:

> [t]he law applied [in an administrative review] is the law as interpreted by the Department of Commerce *at the time that it makes its administrative review decision. The Department of Commerce's interpretation may be quite different from the interpretation it originally applied in the original investigation or in previous administrative reviews.* Examples are instances in which a U.S. court has held that the Department of Commerce's interpretation of the law is incorrect or where the Department of Commerce has decided that a different interpretation of the law is more appropriate.

See Canada's Oral Statement at the first Panel meeting, para. 11 (emphasis added).

addressed such a scenario to date. The only impact of section 129(c)(1), however, is that Commerce would not determine the fate of those pre-implementation entries *in the revocation determination itself.* Section 129(c)(1) does not require Commerce to apply duties to those entries,[15] it does not limit Commerce's discretion in deciding how to administer the law in separate segments of the proceeding with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit Commerce's obligation to implement the results of any such judicial proceedings.[16] Accordingly, section 129(c)(1) does not mandate a breach of any of the provisions of the AD Agreement, the SCM Agreement, or GATT 1994 that Canada cites.

21. Since section 129(c)(1) does not mandate any particular treatment of what Canada terms "prior unliquidated entries" in any determination other than the particular one that is issued under its terms, section 129(c)(1) could *mandate* a breach of WTO rules only if the AD Agreement, the SCM Agreement, or GATT 1994 contained an affirmative obligation for Members to ensure that any implementation of adverse DSB recommendations and rulings applied to both pre- and post-implementation entries. None of the Agreements contains such an obligation; none of the Agreements even addresses what constitutes proper implementation in WTO disputes. The only agreement that *does* address a Member's implementation obligations is the DSU, and Canada has declined to pursue any DSU claims. Under the

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[15] Even the SAA states only that the entries "would remain subject to potential duty liability." SAA at 1026.

[16] In response to the Panel's questions, Canada admitted that section 129(c)(1) would *not* violate WTO rules if Commerce "change[d] its interpretation of U.S. law for other reasons, notably as a result of a direction from a U.S. court." *See* Canada's Responses to Questions, para. 54. It also admitted that section 129(c)(1) "would not prevent a U.S. court from directing the Department of Commerce to change the basis on which it made definitive determinations . . . ." *See id.*, para. 51.

DSU, a Member's implementation obligations are prospective only.[17]

* * * *

[17] The United States discusses below why, contrary to Canada's repeated assertions, it is in fact seeking through this dispute to establish a right of retroactive relief in cases involving antidumping and countervailing measures.

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(2)

No. 06-1632

IN THE

Supreme Court of the United States

JTEKT CORPORATION (F/K/A/ KOYO SEIKO COMPANY, LTD.), KOYO CORPORATION OF U.S.A, NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., AND NTN-BOWER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR TIMKEN US CORPORATION IN OPPOSITION

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QUESTION PRESENTED

If an agency's determination was the subject of an adverse decision by the World Trade Organization's Dispute Settlement Body, should the U.S. court which affirmed the agency's determination nevertheless issue a remand order, when (1) the statute governing implementation of WTO decisions expressly precludes the relief sought by the desired remand; (2) the agency's determination conformed with long-established U.S. law and agency practice; and (3) the agency's practice remained unchanged.

PARTIES TO THE PROCEEDING

Timken US Corporation is a party to the proceeding, but is not listed in the caption. Timken US Corporation was formerly known as the Torrington Company.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Timken US Corporation is a wholly-owned subsidiary of The Timken Company.

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IN THE
Supreme Court of the United States

JTEKT CORPORATION (F/K/A/ KOYO SEIKO COMPANY, LTD.), KOYO CORPORATION OF U.S.A, NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVE SHAFT, INC., AND NTN-BOWER CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF TIMKEN US CORPORATION IN OPPOSITION

OPINIONS BELOW

Timken US Corporation is satisfied with the presentation contained in the petition.

JURISDICTION

Timken US Corporation is satisfied with the presentation contained in the petition.

STATUTES AND REGULATIONS INVOLVED

Petitioners omit the statutory provisions that dispose of their arguments. The Uruguay Round Agreements Act ("URAA"), Pub. L. 103-465, Dec. 8, 1994, 108 Stat. 4809, at Sections 123 and 129, codified as 19 U.S.C. §§ 3533 and 3538, prescribe in detail the procedures to be followed after an adverse WTO panel report or WTO Appellate Body decision. Opp. App. 11a-16a. Section 129 of the URAA, 19 U.S.C. § 3538 disposes of petitioners' claims, and is set forth here, in relevant part:

19 U.S.C. § 3538. Administrative action following WTO panel reports

* * *

(b) Action by administering authority

(1) Consultations with administering authority and congressional committees

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C. § 1671 *et seq.*] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(2) Determination by administering authority

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C. § 1202 *et seq.*], the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(3) Consultations before implementation

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(4) Implementation of determination

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

(c) Effects of determinations; notice of implementation

(1) Effects of determinations

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. § 1671 *et seq.*] that are implemented under this section *shall apply with respect to unliquidated entries of the subject merchandise* (as defined in section 771 of that Act [19 U.S.C. § 1677]) *that are entered, or withdrawn from warehouse, for consumption on or after-*

> **(A)** in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to revoke an order pursuant to that determination, and
>
> **(B)** *in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.*
>
> * * *

(Pub. L. 103-465, Title I, Sec. 129, Dec. 8, 1994, 108 Stat. 4836.) (emphasis added)

STATEMENT OF THE CASE

A. U.S. implementation of adverse WTO dispute settlement decisions

U.S. implementation of adverse WTO decisions is governed by statute. Section 129(b) of the URAA, 19 U.S.C. § 3538(b) (*supra*, Statute and Regulations in-

volved) prescribes procedures if a WTO dispute panel or Appellate Body report "contains findings that an action by [Commerce] in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C. § 1671 *et seq.*] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Duty Measures... ."

Section 129(b) applies here, as the petitioners contest an action by Commerce in a specific annual review (in this case: Commerce's calculation of the weighted-average dumping margin in the 11th annual review, for subject bearings imported from May 1, 1999 to April 30, 2000). Section 129(c)(1)(B), 19 U.S.C. § 3538(c)(1)(B), prescribes the effect of implementation determinations, if made, on Commerce determinations like the one in issue here: they apply to entries of merchandise imported on or after the date on which the United States Trade Representative directs Commerce to implement the adverse WTO decision.

All the imports in issue here were imported prior even to the adverse WTO decision in question (adopted on January 9, 2007), and, necessarily, prior to any decision to implement the adverse decision, since such a decision has not yet been made. Hence, the entries of concern to the petitioners cannot be affected by any decision to implement the adverse WTO decision, even if such a decision should be made.

B. The contested agency determination

In 1989, Commerce and the United States International Trade Commission determined that antifriction bearings imported from, *inter alia*, Japan were sold at less than fair value in the United States, and that such imports injured the domestic industry producing like products. These determinations resulted in the imposition of antidumping duty duties. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan,* 54 Fed. Reg. 20904 (Dep't Comm. May 15, 1989); 19 U.S.C. §§ 1673, 1673b(d), 1673d(c), 1673e(a).

The amount of antidumping duty to be assessed is subject to annual antidumping administrative reviews. The purpose of such a review is to calculate the dumping margin for "each entry" within the period of review, and to assess duties on the basis of these determinations. 19 U.S.C. § 1675(a)(1)(B) and (2)(A) and (C). *See also* 19 C.F.R. § 351.212(b)(1). Absent review, entries are assessed at the deposit rates. 19 C.F.R. § 351.212(c).[1]

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[1] As explained in the legislative history of the 1979 amendments:

> "In the case of a review of an antidumping duty order, the results of the review will include a determination of the foreign market value and the United States price of each entry of merchandise subject to that order and included

At issue here is Commerce's calculation of dumping margins in the 11th annual review of the antidumping duty order on antifriction bearings from Japan. This review covered subject bearings imported from May 1, 1999 to April 30, 2000. The final results of this review were published as *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part*, 66 Fed. Reg. 36551 (Dep't Comm. July 12, 2001).

Commerce's final results were affirmed by the U.S. Court of International Trade on August 10, 2004. Koyo and NTN[2] appealed to Court of Appeals

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> within the review, and the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry. That determination will be the basis for the assessment of antidumping duties on entries of the merchandise included within the review and for deposits of estimated duty on entries not covered by the review."

Trade Agreements Act of 1979, 96th Cong., 1st Sess., H.R. Rep. No. 96-317, at 71-72 (describing the operation of the annual review procedure, introduced at that time). *See also* 19 C.F.R. § 351.212(a)-(c).

[2] The petitioners are exporters of bearings. In briefing to the agency during the review, the petitioners contested various aspects of Commerce's methodology, including, in particular, the treatment of sales that were *not* dumped in the calculation of weighted average dump-

of the Federal Circuit, which affirmed the CIT on December 8, 2006. Pet. at 2a. In addition, the Court of Appeals rejected NTN and Koyo's joint petition for panel rehearing or to stay or extend the time to issue a mandate pending decisions by the United States regarding the implementation of an adverse decision by the WTO Dispute Settlement Body.

C. WTO dispute settlement decisions, generally

In 1994, the United States became a party to the Uruguay Round Agreements. These include the WTO Agreement,[3] the Antidumping Agreement[4] and the Dispute Settlement Understanding (DSU).[5] These agreements, which are not self-executing, were implemented in U.S. law by the URAA. *See, e.g., Uruguay Round Agreements Act, Statement of Administrative Action*, at 11-12, 103d Cong., 2d

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ing margins. Subsequently, Koyo and NTN both filed a summons and complaint contesting the agency's final results. Koyo's complaint contested the treatment of sales that were not dumped; NTN's did not.

[3] Agreement Establishing the World Trade Organization, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1327-37 (1994) (including list of annexed materials).

[4] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (a/k/a the Antidumping Agreement), *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1453-77 (1994).

[5] Understanding on Rules and Procedures Governing the Settlement of Disputes, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1654-78 (1994).

Sess., H.R. Doc. No. 103-316, Vol. 1, 656, at 667-68 (1994), *reprinted in* 1994 U.S.C.C.A.N. Vol. 6, 4040 (hereinafter "*SAA*").[6]

In the DSU, the parties established a Dispute Settlement Body authorized to adopt panel or Appellate Body reports addressing disputes arising under the agreements. The panel or Appellate Body reports contain conclusions addressing whether the identified measures conform with agreements covered by the DSU, but otherwise contain *recommendations only*:

> 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall *recommend* that Member concerned bring the measure into conformity with that agreement. In addition to its *recommendations*, the panel or Appellate Body may *suggest ways* in which the Member concerned *could* implement the recommendations.

DSU, Art. 19, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1666 (1994) (emphasis added; footnotes omitted). Thus, as explained at length in the *SAA*:

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[6] For ease of reference, page citations to the SAA will reflect the pagination of H.R. Doc. No. 103-316, which is also reproduced in 1994 U.S.C.C.A.N. Vol. 6, 4040.

> It is important to note that the new WTO dispute settlement system does not give the panels any power to order the United States or other countries to change their laws. If a panel finds that a country has not lived up to its commitments, all a panel may do is recommend that the country begin observing its obligations. It is then up to the disputing countries to decide how they will settle their differences.

SAA at 1008. And again:

> When it finds that a government's measure is inconsistent with a Uruguay Round Agreement, a panel or the Appellate Body must issue a recommendation to that government to bring the offending measure into conformity with the agreement. While the panel or Appellate Body may also suggest ways to implement such a recommendation, Article 19 makes it clear that any such suggestion is non-binding. Any decision on whether or how to implement such a recommendation is entirely a matter for the country concerned.

SAA at 1015.

Thus, after an adverse finding, an affected country may choose among various actions, including doing nothing:

> The defending country may choose to make a change in its law. Or it may decide instead to offer trade "compensation" – such as lower tariffs. The countries concerned could agree on compensation or on some other mutually satisfactory solution. Alternatively, the defending country may decide to do nothing. In that case, the country that lodged the complaint may retaliate by suspending trade concessions equivalent to the trade benefits it has lost.

SAA at 1009. *See also* DSU, Arts. 3.7 and 22.1-2, *reprinted in* H.R. Doc. No. 103-316, Vol. 1 at 1655-56 and 1668. In addition, the dispute settlement decisions cannot modify the parties' rights or obligations under the agreements, and parties always retain the right to seek an authoritative interpretation of any Agreement from the Ministerial Conference or General Council of the WTO. *SAA* at 1010; DSU Arts. 3.2, 3.9 and 19.2, *reprinted* in H.R. Doc. No. 103-316, Vol. 1 at 1655-56 and 1667.

Finally, dispute settlement decisions, even if final, "are not binding, except with respect to resolving the particular dispute between the parties to that dispute." WTO, *Japan - Taxes on Alcoholic Beverages, AB-1996-2*, WT/DS8/AB/R (Oct. 4, 1996), Section E (status of adopted panel reports); WTO, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug. 24, 1998), par. 7.30; WTO, *United States - Tax*

Treatment for "Foreign Sales Corporations," AB-1999-9, WT/DS108/AB/R (Feb. 24, 2000), par. 108.[7]

D. The particular WTO decisions invoked by the petitioners, and their aftermath

Following a complaint by the Government of Japan, a WTO dispute panel reported that Commerce's calculation of the weighted-average dumping margin (including "zeroing"), as done in administrative reviews (including the review in issue in this case), was *consistent* with the Antidumping Agreement. WTO, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R (Sept. 20, 2006), at Paras. 7.227 and 7.259(b)-(c). This initial finding, however, was reversed by a subsequent decision of

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[7] As such, the interpretations found in the panels' various decisions are *not* rules of general application nor are they widely accepted. Hence, they do not constitute "the law of nations as understood in this country." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *See Restatement of the Law, Third, The Foreign Relations Law of the United States*, Vol. I, §101 (defining international law, as used in the restatement, as "rules and principles of general application") and §102(3) ("International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1154 (7th Cir. 2001) (not applying *Charming Betsy* where international law consisted of evolving customary law).

the Appellate Body, which was ultimately adopted by the DSB. WTO, *Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007), at Para. 190(e) (findings and conclusions).

Petitioners claim, at least in their argument, that "the United States also committed to the WTO *in this specific administrative review* that it will implement the WTO's rejection of zeroing." Pet. at 17.[8] This is incorrect. The United States indicated that "it intends to comply in this dispute with its WTO obligations and will be considering carefully how to do so." "U.S. Statements at the WTO Dispute Settlement Body Meeting," delivered by David P. Shark, Deputy Chief of U.S. Mission to the WTO at Geneva, at Item 2.A. (Feb. 20, 2007), available at: www.us-mission.ch/Press2007/0220DSB. *Accord* Pet. at 10 (statement of the case).

Petitioners also assert that "[t]he United States has committed to Japan that it will fully implement the Appellate Body's decision by December 24, 2007." Pet. at 10. This too is incorrect. Instead, the United States and Japan "mutually agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute 'United States – Measures Relating to Zeroing and Sunset Reviews' (WT/DS322) shall be 11 months, expiring

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[8] *But see* Pet. at 10.

on 24 December 2007." WTO, *United States – Measures Relating to Zeroing and Sunset Reviews*, Agreement under Article 21.3(b) of the DSU, WT/DS322/20 (May 8, 2007).

Finally, the petitioners omit that the United States has expressed its opposition to the Appellate Body report in a communication by the United States to the Members of the WTO and the Dispute Settlement Body, and has made proposals to the WTO to add language to the Antidumping Agreement affirming that the member countries' antidumping authorities do *not* have an obligation under the Agreement to offset the results of comparisons where the export prices exceeded normal value (fair sales) against comparisons where the export prices were less than the normal value (dumped sales). WTO, *Communication from the United States, United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/16 (Feb. 26, 2007); WTO, *Proposal from the United States, Proposal On Offsets For Non-Dumped Comparisons,* TN/RL/GEN/147 (June 27, 2007).

E. Commerce's calculation of weighted average dumping margins, in its statutory context

"The terms 'dumped' and 'dumping' refer to the sale of goods at less than fair value." 19 U.S.C. § 1677(34). The "dumping margin" is the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). The "weighted average dumping margin" is the percentage obtained by dividing the "aggregate dumping margins" by "the ag-

gregate export prices and constructed export prices ... ." 19 U.S.C. § 1677(35)(B).[9]

To obtain the *denominator* in the weighted-average dumping margin calculation (the aggregate prices), Commerce aggregates all prices, as observed in all transactions, whether or not dumped. Commerce's calculation of the denominator of the weighted average dumping margin is not contested.

To obtain the *numerator* of the weighted-average dumping margin calculation (the aggregate dumping margins), Commerce totals the dumping margins, *i.e.*, the amounts "by which the normal value exceeds the export price or constructed export price," in the sales where this is the case (*i.e.*, the dumped sales). The non-dumped sales do not have any amount of dumping. The dumping margin is thus "zero," and no amount is added to or subtracted from the aggre-

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[9] The definitions of "dumping margin" and "weighted average dumping margin," added to the statute in 1994, were substantially identical to definitions in Commerce's pre-existing regulations. *See* Uruguay Round Agreements Act, 103d Cong. 2d Sess., S. Rep. No. 103-412 at 79-80 (1994); 19 C.F.R. § 353.2(f)(1) (1993) ("*Dumping margin*" means the amount by which the foreign market value exceeds the United States price of the merchandise") and (f)(2) ("The '*weighted-average dumping margin*' is the result of dividing the aggregated dumping margins by the aggregated United States prices.") (italics in original); *Antidumping Duties, Final Rule*, 54 Fed. Reg. 12742, 12770 (Dep't Comm. Mar. 28, 1989).

gate amounts of dumping found. The latter calculative measure has come to be known (among its opponents in particular) as "zeroing."

The incidence of fair sales reduces the weighted-average dumping margin, because *all* sales, including sales sold at fair value, are included in the denominator of the calculation. Commerce's methodology, however, does not permit the amounts by which some sales are *not* dumped to offset the actual dumping margins found in dumped sales.

F. Petitioners' allegation that Commerce changed its practice

Petitioners assert that Commerce's zeroing practice is "a policy that Commerce has since announced it will abandon." Pet. at 3. Elsewhere Petitioners cite *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dep't Comm. Dec. 27, 2006), as evidencing a "change in policy." Pet. at 8-9. *See also id.* at 16 (asserting the "Executive Branch" has announced its intention to modify the zeroing practice).

Petitioners' characterizations erroneously imply that Commerce has abandoned the zeroing practice as applied in antidumping annual reviews, such as the agency determination in issue here. Commerce has *not* done so. As discussed in more detail in the argument section of this opposition, while Commerce adopted a change in investigations, it expressly de-

clined invitations to apply the change to other types of determinations, such as annual reviews.

G. Prior judicial review of Commerce's method

Commerce's method has twice been approved as lawful under U.S. law by the Court of Appeals for the Federal Circuit, regardless of adverse WTO decisions. *Timken Co. v. United States,* 354 F.3d 1334, 1342-45 (Fed. Cir. 2004), *cert. denied sub nom. Koyo Seiko Co., Ltd. v. United States*, 543 U.S. 976 (2004); *Corus Staal BV v. Dep't of Commerce,* 395 F.3d 1343, 1346 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006).

It has also been upheld numerous times by the Court of International Trade. *Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360-61 (Ct. Int'l Trade 1987); *Bowe Passat Reinigungs- Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (Ct. Int'l Trade 1996). And, more recently, applying the law as modified in 1994, *Timken Co. v. United States*, 240 F. Supp.2d 1228, 1242-44 (Ct. Int'l Trade 2002), *aff'd*, 354 F.3d 1334, 1342-45 (Fed. Cir. 2004), *cert. denied sub nom. Koyo Seiko Co., Ltd. v. United States*, 543 U.S. 976 (2004); *Corus Staal BV v. U.S. Dep't of Commerce*, 259 F. Supp.2d 1253, 1264-65 (Ct. Int'l Trade 2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006); *PAM, S.p.A. v. U.S. Dep't of Commerce*, 265 F. Supp.2d 1362, 1373 (Ct. Int'l Trade 2003); *Corus Engineering Steels Ltd. v. United States*, 27 CIT 1286, 2003 WL 22020504, Slip Op. 03-110 at 18 (Ct. Int'l Trade) (Aug. 27, 2003); *Slater Steels Corp. v. United States*,

297 F. Supp.2d 1351, 1359 (Ct. Int'l Trade 2003), *aff'd on other grounds*, 159 Fed. Appx. 1007 (Fed. Cir. Dec. 6, 2005); *NSK Ltd. v. United States*, 346 F. Supp.2d 1312, 1321 (Ct. Int'l Trade 2004), *aff'd on other grounds*, 481 F.3d 1355 (Fed. Cir. 2007), *petition reh'g denied* (May 3, 2007), Order of the U.S. Supreme Court Temp. Ct. No. 07A84 (Aug. 23, 2007) (granting extension of time to file petition for cert. until Sept. 30, 2007); *Corus Staal BV v. United States*, 387 F. Supp.2d 1291, 1300 (Ct. Int'l Trade 2005), *aff'd*, 186 Fed. Appx. 997 (Fed. Cir. 2006), *rehearing en banc denied* (CAFC No. 05-1600, Sept. 12, 2006), *cert. denied*, 127 S. Ct. 3001 (No. 06-1057, June 25, 2007);[10] *NSK Ltd. v. United States*, 416 F. Supp.2d 1334, 1338-39 (Ct. Int'l Trade 2006); *Paul Müller Industrie GmbH & Co. v. United States*, 435 F. Supp.2d 1241, 1245 (Ct. Int'l Trade 2006), *reconsideration on other grounds denied by*, 442 F. Supp.2d 1363 (Ct. Int'l Trade 2006); *Koyo Seiko Co. Ltd. v. United States*, 442 F. Supp.2d 1360, 1363 (Ct. Int'l Trade 2006) (motion to amend complaint denied – noting Federal Circuit precedent re zeroing); *Dorbest Ltd. v. United States*, 462 F. Supp.2d. 1262, 1316-17 (Ct. Int'l Trade 2006); *Corus Staal BV v. United States*, 2006 WL 2056401, Slip Op. 06-112 at 6 (Ct. Int'l Trade July 25, 2006); *SKF USA Inc. v. United States*, 491 F. Supp.2d 1354, 1365-66 (Ct. Int'l Trade 2007).

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[10] Petitioners offered similar arguments (*i.e.*, circuit conflict with respect to an alleged change in agency policy, international obligations).

In addition, the courts have repeatedly rejected attempts to stay litigation regarding Commerce's method pending developments regarding adverse WTO decisions. *E.g.*, in litigation regarding the bearings antidumping orders: Order of the U.S. Court of Appeals for the Federal Circuit, *SNR Roulements v. United States*, Appeal Nos. 05-1297, -1323, at 3 (May 30, 2006) (re the instant case – Order simultaneously entered in Appeal No. 05-1296 and captioned as "*NSK Ltd. v. United States*") ("As we have indicated in an earlier order, we are not persuaded that stays pending resolution of the WTO proceedings is warranted."); Order of the U.S. Court of Appeals for the Federal Circuit, *SNR Roulements v. United States*, Appeal Nos. 05-1297, -1322, -1323, at 3 (June 30, 2005) (re the instant case) ("Koyo's motion for a stay pending completion of WTO proceedings is denied.").

REASONS FOR DENYING THE PETITION

I. The result sought by the petitioners is expressly precluded by the statute

The petitioners principally argue that, without a remand, Commerce will not be able to apply the WTO decision and recalculate the duties on the entries that are the subject of their appeal, *i.e.* entries imported in the May 1, 1999 to April 30, 2000 period. Pet. at 14-15.

The URAA, however, in Section 129, 19 U.S.C. § 3538, contains express instruction regarding the implementation of a WTO decision that an agency action in a particular proceeding does not conform with

WTO agreements. The statute prescribes that such an implementation determination "*shall apply* with respect to unliquidated entries of subject merchandise ... that are entered, or withdrawn from warehouse, for consumption on or *after ... the date on which the United States Trade Representative directs the administering authority ... to implement that determination.*" 19 U.S.C. § 3538(c)(1)) (emphasis added).[11]

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[11] As also explained in the Statement of Administrative Action:

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) [19 U.S.C. § 3538(c)(1)] provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of [sic] Trade

The entries at issue here concern merchandise imported between May 1, 1999 and April 30, 2000. Thus, the entries that were the subject of the annual review are statutorily out of the reach of any implementation determination, and the result sought by the petitioners is precluded by the statute.

Consistent with the statute's mandate, Commerce's Section 129 decisions to date have never made changes to entries which pre-dated the direction from the USTR to Commerce to implement a decision of the WTO Dispute Settlement Body. The petitioners cite no such decisions, because there are none. For example, in its recent Section 129 decisions implementing the WTO decision regarding zeroing in *original investigations*, Commerce revoked certain antidumping orders. The revocation, however, did not apply to entries which predated the date of implementation directed by the United States Trade Representative. *Implementation of the Findings of the WTO Panel in US--Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders,* 72 Fed. Reg. 25261 (Dep't Comm. May 4,

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Representative's direction would remain subject to potential duty liability.

SAA at 1026 ("Effect of Determination"). Similar explanations and instructions are found in the House and Senate reports. 103d Cong., 2d Sess., H.R. Doc. No. 103-826(1) at 39 (1994), *reprinted in* 1994 U.S.C.C.A.N., Vol. 6, 3773, 3811; S. Rep. No. 103-412 at 27 (1994).

2007), Issues and Decision Memorandum of Apr. 9, 2007, at 17,[12] available at: www/ia/ita.doc.gov/download/zeroing/zeroing-sec-129-final-decision-mem.200700410.

II. The DC Circuit precedent identified by the petitioners does not apply, because there has been no change at all in the applicable agency policy or regulation

Petitioners assert that the Federal Circuit's decision to affirm Commerce's determination is at odds with D.C. Circuit precedent requiring that a court reviewing an agency decision must remand to the agency "when the agency has announced a change in its governing regulations or policies during the pendency of the appeal." Pet. at 12, citing, *Panhandle Eastern Pipe Line Co. v. FERC*, 890 F.2d 435, 438-39 (D.C. Cir. 1989). Thus, they argue, the Federal Circuit's decision in the instant matter "perpetuates an unwarranted conflict" between the cir-

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[12] *Accord Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 67 Fed. Reg. 71936, 71937 (Dep't Comm. Dec. 3, 2002), applying newly calculated rates to "unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after November 22, 2002," which was the date USTR directed Commerce to implement the Section 129 determination.

cuits in the law governing judicial review of federal agencies. Pet. at 12-16.

Petitioners' argument is premised on the existence of a change in agency policy, practice or regulation. Here, there has been no change. Commerce has *not* abandoned, or announced that it would abandon, any part of the methodology employed to calculate weighted-average dumping margins in annual reviews. Commerce has announced a change with respect to the calculation of estimated weighted-average dumping margins in original *investigations*—but this change does *not* apply to annual reviews. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dep't Comm. Dec. 27, 2006).[13] Indeed, Commerce, when announcing the change in practice with regard to investigations, expressly rejected the suggestion of some commenters that the change adopted by Commerce for purposes of *investigations* should also be applied in *other segments* of antidumping proceedings (such as reviews):

> In its March 6, 2006 **Federal Register** notice, the Department proposed only

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[13] In addition, it is the position of Timken that the antidumping statute mandates the "zeroing" methodology. Supra, page 14, discussing the methodology in its statutory context. Thus, Commerce does not have the authority to change its practice, whether in investigations or annual reviews.

> that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding.

71 Fed. Reg. 77722, 77724 (emphasis in original). *See also, infra*, reviewing the ways in which Commerce may abide by its international obligations.

Petitioners' argument further fails because it does not account for the fact that here there is specific statutory instruction. Assuming, *arguendo*, that there was a change, here there is no need "to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act," Pet. at 14, citing *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 n.10 (1974), because here there is express statutory instruction regarding the temporal reach of any change. As discussed before, the statute precludes application of a change to entries imported prior to the date USTR directs implementation.

III. The Court of Appeals for the Federal Circuit respected the separation of powers

Petitioners assert that the United States has communicated "that it intends to comply in this dis-

pute with its WTO obligations and will be considering carefully how to do so." Pet. at 17-18. According to the petitioners, however, unless a remand is issued to the agency, there "will be *no* way to comply with its treaty obligations in this administrative review...". *Id.* at 18. Thus, they argue, the Federal Circuit Court's refusal to remand interfered with the Executive Branch's ability to comply with the United States' WTO obligations. *Id.* at 16-20. The same allegations appear in the Petitioners' statement of the case. *Id.* at. 10.

A. Petitioners' arguments rest on assumptions that are either wrong, or not yet knowable

The petitioners assume, at the least: (1) that United States may abide by its WTO obligations *only* by abandoning its long-standing zeroing practice as applied in reviews; (2) that the United States, *if* it determined to abandon its long-standing practice, *must* retroactively apply that change to the current review; and (3) that if the United States determined to retroactively apply the particular change adopted, the application of such a change would require that dumping duties be modified (presumably, lowered or eliminated).

The second assumption has already been discussed. Recalculating the duties on the subject entries would be contrary to the statute, which directs that any change may be applied only to entries after the date USTR directs implementation. *Supra*, Section I.

The first assumption too, however, is plainly erroneous. As reflected in the DSU itself, in the U.S. statute implementing the WTO Agreements, and in the *SAA* accompanying the statute, the U.S. executive branch, in consultation with the Congress, may choose any number of different responses to an adverse WTO report, including: (a) doing nothing; (b) negotiating a resolution between the U.S. and the aggrieved WTO Member or Members; and (c) modifying U.S. law or practice to bring itself into conformity with its WTO obligations as construed by the WTO panel or Appellate Body. 19 U.S.C. §§ 3538(b)(4) (the USTR "*may*, after consulting with the administrative authority and the congressional committees...direct the administering authority to implement, *in whole or in part*....) (emphasis added) and 3533(f)(3) (requiring the USTR to consult with congressional committees "concerning *whether to implement* the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation.") (emphasis added); DSU, Art. 19, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1666 (1994); *SAA* at 1008-1009. *Supra*, 9 (discussing effect of WTO dispute settlement decisions). Each of these actions would be consistent with the international obligations of the United States, and none of them *necessarily* includes a recalculation of the antidumping duties on the subject entries.

The third assumption (that the change would require different, presumably lower, duty assessments) is premature. Commerce has not adopted any change, or proposed any change. Thus, nothing is

known about the substance or reach of any potential new methodology, should one in fact be adopted. Moreover, in other cases, the application of new methods has not necessarily resulted in lower margins.[14]

B. The Court correctly decided not to interject itself in a process which the statute has assigned to Congress and the Executive Branch

Congress placed the responsibility for the implementation of adverse WTO decisions with the Executive Branch, in particular Commerce, and the United States Trade Representative. Pet. at 16. The courts, meanwhile, must review the agency's decisions under the applicable *U.S. law*, which is the U.S. law that governs at the time the court makes its decision. *See, e.g., Bradley v. School Bd. of Richmond,* 416 U.S. 696, 711-12 (1974); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991). A choice of law issue *may* arise at such a time when

---

[14] When Commerce revised its calculation method as used in an investigation (not an annual review) of imports of softwood lumber, margins increased. Compare *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36067, 36069 (Dep't Comm. May 22, 2002) with *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 22636, 22645 (Dep't Comm. May 2, 2005).

the law has in fact changed, and a court may *then* be called upon to decide whether its decision is governed by the new law governing at the time of the court's decision or the prior law. *See, e.g., J. B. Beam*, 501 U.S. at 534-35. But here no such choice of law issue arises, because no modification has yet been adopted (and no such modification could be applied to the entries in issue). And, in any event, the temporal reach of any change is expressly addressed in the statute.

Thus, the Appellate Court, recognizing that Commerce's practice was lawful under existing U.S. law, and respecting the statute's detailed instruction regarding the implementation of adverse WTO dispute settlement decisions, correctly declined to remand. Conversely, if the reviewing court had instead set aside Commerce's lawful determination, in the anticipation that U.S. law or Commerce's practice would change, then it would have impermissibly interfered in a task which Congress reserved for itself and the Executive Branch. As reviewed by the Federal Circuit court in a prior appeal:

> Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations, and, if so implemented, the extent of implementation. *See* 19 U.S.C. §§ 3533(f), 3538 (2000); *see also*

> 19 U.S.C. § 3533(g) (2000) (defining a statutory scheme that Commerce must observe in order to change its policy to conform to a WTO ruling).
>
> ***
>
> "The conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government ...." *United States v. Pink*, 315 U.S. 203, 222-23, 62 S.Ct. 552, 86 L.Ed. 796 (1942). In this case, section 1677(35) presented Commerce with a choice as to how it calculates weighted-average dumping margins. We give Commerce substantial deference in its administration of the statute because of the foreign policy implications of a dumping determination. *See Fed.-Mogul Corp. v. United States*, 63 F.3d 1572, 1582 (Fed. Cir. 1995). *We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.*

Corus, 395 F.3d at 1349 (emphasis added). *See also Corus*, 387 F. Supp.2d at 1300.

CONCLUSION

For all of the reasons stated above, Timken prays that this Honorable Court deny the petition for a *writ of certiorari*.

Respectfully submitted,

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Dated: September 7, 2007

APPENDIX

APPENDIX -- STATUTORY PROVISIONS

19 U.S.C. § 1673. Imposition of antidumping duties

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

> (A) an industry in the United States-- (i) is materially injured, or (ii) is threatened with material injury, or
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this section and section 1673d(b)(1) of this title, a reference to the sale of foreign merchandise includes the entering into of any leasing ar-

rangement regarding the merchandise that is equivalent to the sale of the merchandise.

(June 17, 1930, ch. 497, title VII, Sec. 731, as added Pub. L. 96-39, title I, Sec. 101, July 26, 1979, 93 Stat. 162; amended Pub. L. 98-573, title VI, Sec. 602(b), Oct. 30, 1984, 98 Stat. 3024; Pub. L. 103-465, title II, Sec. 233(a)(1)(A), (2)(A)(i), Dec. 8, 1994, 108 Stat. 4898.)

19 U.S.C. § 1675. Administrative review of determinations

(a) Periodic review of amount of duty

(1) In general

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 \1\ of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net countervailable subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net countervailable subsidy or dumping margin involved in the agreement,

and shall publish in the Federal Register the results of such review, together with notice of

any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

***

(3) Time limits

(A) Preliminary and final determinations

The administering authority shall make a preliminary determination under subparagraph (A), (B), or (C) of paragraph (1) within 245 days after the last day of the month in which occurs the anniversary of the date of publication of the order, finding, or suspension agreement for which the review under paragraph (1) is requested, and a final determination under paragraph (1) within 120 days after the date on which the preliminary determination is published. If it is not practicable to complete the review within the foregoing time, the administering authority may extend that 245-day period to 365 days and may extend that 120-day period to 180 days. The administering authority may extend the time for making a final determination without extending the time for making a preliminary determination, if such final determination is made not later than 300 days after the date on which the preliminary determination is published.

(B) Liquidation of entries

If the administering authority orders any liquidation of entries pursuant to a review under paragraph (1), such liquidation shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued. In any case in which liquidation has not occurred within that 90-day period, the Secretary of the Treasury shall, upon the request of the affected party, provide an explanation thereof.

(C) Effect of pending review under section 1516a

In a case in which a final determination under paragraph (1) is under review under section 1516a of this title and a liquidation of entries covered by the determination is enjoined under section 1516a(c)(2) of this title or suspended under section 1516a(g)(5)(C) of this title, the administering authority shall, within 10 days after the final disposition of the review under section 1516a of this title, transmit to the Federal Register for publication the final disposition and issue instructions to the Customs Service with respect to the liquidation of entries pursuant to the review. In such a case, the 90-day period referred to in subparagraph (B) shall begin on the

day on which the administering authority issues such instructions.

***

(June 17, 1930, ch. 497, title VII, Sec. 751, as added Pub. L. 96-39, title II, Sec. 101, July 26, 1979, 93 Stat. 175; amended Pub. L. 98-573, title VI, Sec. 611(a)(2), (3), Oct. 30, 1984, 98 Stat. 3031; Pub. L. 99-514, title XVIII, Sec. 1886(a)(8), Oct. 22, 1986, 100 Stat. 2922; Pub. L. 100-418, title I, Sec. 1333(b), Aug. 23, 1988, 102 Stat. 1209; Pub. L. 103-465, title II, Secs. 220(a), 283(c), Dec. 8, 1994, 108 Stat. 4857, 4930; Pub. L. 106-36, title II, Sec. 2410, June 25, 1999, 113 Stat. 171.)

19 U.S.C. § 1677. Definitions; special rules

For purposes of this subtitle—

***

(34) Dumped; dumping

The terms ``dumped" and ``dumping" refer to the sale or likely sale of goods at less than fair value.

(35) Dumping margin; weighted average dumping margin

(A) Dumping margin

The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

(B) Weighted average dumping margin

The term ``weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

***

(June 17, 1930, ch. 497, title VII, Sec. 771, as added Pub. L. 96-39, title I, Sec. 101, July 26, 1979, 93 Stat. 176; amended Pub. L. 98-573, title VI, Sec. 612(a), Oct. 30, 1984, 98 Stat. 3033; Pub. L. 99-514, title XVIII, Sec. 1886(a)(9), Oct. 22, 1986, 100 Stat. 2922; Pub. L. 100-418, title I, Secs. 1312, 1316(b), 1326(a)-(c), 1327-1330, 1335, Aug. 23, 1988, 102 Stat. 1184, 1187, 1203-1206, 1210; Pub. L. 100-449, title IV, Sec. 403(d), Sept. 28, 1988, 102 Stat. 1887; Pub. L. 100-647, title IX, Sec. 9001(a)(5), Nov. 10, 1988, 102 Stat. 3807; Pub. L. 101-382, title I, Sec. 139(a)(3), title II, Sec. 224(a), (b), Aug. 20, 1990, 104 Stat. 653, 659, 660; Pub. L. 103-182, title IV, Sec. 412(b), title VI, Sec. 637(b), Dec. 8, 1993, 107 Stat. 2146, 2203; Pub. L. 103-465, title II, Secs. 221(b), 222, 229(b), 233(a)(3), (4), (5)(BB)-(FF), (b), 251, 266, 267, 270(c)(2), (e), Dec. 8, 1994, 108 Stat. 4869, 4890, 4898-4902, 4915, 4917, 4918; Pub. L. 104-295, Sec. 20(b)(7), (14), Oct. 11, 1996, 110 Stat. 3527.)

19 U.S.C. § 3512. Relationship of agreements to United States law and State law

(a) Relationship of agreements to United States law

(1) United States law to prevail in conflict

No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

(2) Construction

Nothing in this Act shall be construed--

(A) to amend or modify any law of the United States, including any law relating to--

(i) the protection of human, animal, or plant life or health,

(ii) the protection of the environment, or

(iii) worker safety, or

(B) to limit any authority conferred under any law of the United States, including section 2411 of this title, unless specifically provided for in this Act.

***

(c) Effect of agreement with respect to private remedies

(1) Limitations

No person other than the United States--

(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

(B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

(2) Intent of Congress

It is the intention of the Congress through paragraph (1) to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements--

(A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or

(B) on any other basis.

***

(Pub. L. 103-465, title I, Sec. 102, Dec. 8, 1994, 108 Stat. 4815.)

19 U.S.C. § 3533. Dispute settlement panels and procedures

* * *

(g) Requirements for agency action

(1) Changes in agency regulations or practice

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f) of this section;

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

(E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and

(F) the final rule or other modification has been published in the Federal Register.

(2) Effective date of modification

A final rule or other modification to which paragraph (1) applies may not go into effect before the end of the 60-day period beginning on the date on which consultations under paragraph (1)(E) begin, unless the President determines that an earlier effective date is in the national interest.

(3) Vote by congressional committees

During the 60-day period described in paragraph (2), the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate may vote to indicate the agreement or disagreement of the committee with the proposed contents of the final rule or other modification. Any

such vote shall not be binding on the department or agency which is implementing the rule or other modification.

(4) Inapplicability to ITC

This subsection does not apply to any regulation or practice of the International Trade Commission.

* * *

(Pub. L. 103-465, title I, Sec. 123, Dec. 8, 1994, 108 Stat. 4830.)

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③

No. 06-1632

In the Supreme Court of the United States

JTEKT CORPORATION FKA KOYO SEIKO COMPANY, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a party is entitled to have the final results of the Department of Commerce's administrative review of antidumping duties set aside on the basis of an adverse World Trade Organization (WTO) report, where Commerce's final results are indisputably consistent with the governing domestic statute as well as with Commerce's policies at the time the results were issued, and where Congress has specifically provided that WTO reports have no domestic legal effect except as implemented by the Executive Branch or Congress, neither of which has called into question the continuing validity of the final results here at issue.

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In the Supreme Court of the United States

No. 06-1632

JTEKT CORPORATION FKA KOYO SEIKO COMPANY, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment without opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter, but is reprinted at 210 Fed. Appx. 992. The opinion of the Court of International Trade (Pet. App. 3a-33a) is reported at 341 F. Supp. 2d 1334.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2006. A petition for rehearing was denied on February 6, 2007 (Pet. App. 50a-51a). On May 7, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 6, 2007, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Antidumping laws provide for the imposition of antidumping duties where "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673(1). If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an antidumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i).

If the Department of Commerce conducts an antidumping investigation and makes a final determination that merchandise is being sold in the United States at less than its fair value, it is required to determine an "estimated weighted average dumping margin." 19 U.S.C. 1673d(c)(1)(B)(i)(I). The statute specifies that the "dumping margin" is "the amount by which the normal value exceeds the export price," and that the "weighted average dumping margin" is the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices" for that exporter or producer. 19 U.S.C. 1677(35)(A) and (B).

Once the Department of Commerce finds that dumping has occurred, exporters and producers must then post a cash deposit or security for each future entry in an amount based on their dumping margin. 19 U.S.C. 1673d(c)(1)(B). Before final liquidation of entries sub-

ject to an antidumping duty order, the statute provides that on an annual basis, any interested party may request a retrospective administrative review of the antidumping duty. 19 U.S.C. 1675. The dumping margin that is determined during the course of that retrospective review then becomes the rate at which the entries that occurred during the relevant review period are liquidated, as well as the basis for estimated antidumping duties on new entries. 19 U.S.C. 1675(a)(2)(A) and (C).

The long-standing practice of the Department of Commerce has been to count only positive dumping margins when calculating aggregate dumping margins, a practice known as "zeroing." Under that approach, where normal value does not "exceed[]" the export price, 19 U.S.C. 1677(35)(A), there is no, or zero, "dumping margin," and thus nothing to include when calculating the "aggregate dumping margin" that the statute specifies as the numerator in the "weighted average dumping margin" ratio. 19 U.S.C. 1677(35)(B). In other words, "negative" dumping margins for products sold in the United States at a price above the normal value of the goods in the exporting country do not offset an exporter's or producer's dumped sales.

2. In 1994, the United States became a signatory to several Executive agreements, known collectively as the Uruguay Round Trade Agreements (Agreements), one of which is the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement)*, *reprinted in* 1 H.R. Doc. No. 316, 103d Cong., 2d Sess. 1453 (H.R. Doc. No. 316). Congress enacted the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (19 U.S.C. 3501 *et seq.)*, to implement those Agreements. 19 U.S.C. 3511. In the URAA, Congress established detailed rules

regarding the relationship between the Agreements and domestic law (including domestic trade laws), as well as an elaborate process for resolving disputes concerning the consistency of domestic laws with the Agreements.

As a general matter, Congress emphasized the continuing primacy of domestic law in the event of any conflict between it and the Agreements. As such, "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. 3512(a)(1). Congress further stated, with respect to the interaction of the URAA and domestic law, that "[n]othing in this Act shall be construed * * * to limit any authority conferred under any law of the United States * * * unless specifically provided for in this Act." 19 U.S.C. 3512(a)(2).

The URAA also clarifies that neither the Agreements nor Congress's approval of the Agreements creates privately enforceable rights or provides a basis for challenging an Executive Branch action:

> No person other than the United States—
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

Because the URAA specifies that the Agreements create no privately enforceable rights and cannot provide the basis for challenging administrative actions, only the Agreements' mechanisms may be invoked to resolve disputes as to the United States' compliance with its obligations under the Agreements. See Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding), 33 I.L.M. 1226 (1994); 19 U.S.C. 3511(d)(16). Those procedures include a proceeding before a World Trade Organization (WTO) panel, the findings of which can be appealed to the WTO Appellate Body. See Dispute Settlement Understanding, Arts. 6, 17, 33 I.L.M. at 1230, 1236. Private entities may not initiate a proceeding before a WTO panel; rather, only a WTO member may invoke the WTO dispute settlement procedures. *Id.* Art. 2.1, 33 I.L.M. at 1226.

Congress was very specific about the manner in which the United States would respond to reports issued by WTO panels or the WTO Appellate Body. The Statement of Administrative Action (SAA), which was expressly "approved" as "authoritative" by Congress in connection with the passage of the URAA, see 19 U.S.C. 3511(a), 3512(d), makes clear that WTO panels and Appellate Body reports "will not have any power to change U.S. law or order such a change." H.R. Doc. No. 316, at 659. Nor may a party ask a court to direct implementation of a WTO report. To the contrary, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Ibid.*

In the URAA, Congress established two procedures by which a WTO report may be implemented in domestic law. The first method, set forth in Section 123 of the

URAA, 19 U.S.C. 3533, establishes a procedure for amending, rescinding, or modifying an agency regulation or practice (within the meaning of United States law) to implement a WTO report concluding that the regulation or practice is inconsistent with the Uruguay Round Trade Agreements, including the Antidumping Agreement. 19 U.S.C. 3511. Section 123(g) specifies that the regulation or practice that the WTO body has found inconsistent with the Agreements "*may not* be amended, rescinded, or otherwise modified * * * unless and until" the elaborate procedures detailed in the subsection have been complied with. 19 U.S.C. 3533(g)(1) (emphasis added). The United States Trade Representative (USTR) is required to consult with the appropriate congressional committees, agency or department head, and private sector advisory committees, and the public must be provided an opportunity to comment, before a determination is made whether and how to implement a WTO report. 19 U.S.C. 3533(g)(1)(A)-(F).

A second procedure for implementing a WTO report in domestic law is set forth in Section 129 of the URAA, 19 U.S.C. 3538. Section 129 is narrower in scope than Section 123(g), and applies when a WTO report indicates that a particular action by the Department of Commerce (or the International Trade Commission) in an antidumping proceeding was not in conformity with the obligations of the United States under the Antidumping Agreement. 19 U.S.C. 3538(b)(1). Like the statutory procedure under Section 123, Section 129 provides for consultation between the USTR and relevant stakeholders before the USTR makes a determination whether, and the Department of Commerce determines how, to implement the WTO report. 19 U.S.C. 3538(b)(3) and (d). Upon completion of that process, the

USTR "*may* * * * direct the [Department of Commerce] to implement, in whole or in part," a new determination consistent with the WTO body's findings. 19 U.S.C. 3538(b)(4) (emphasis added). If the USTR requests the Department of Commerce to issue a new determination and orders the Department of Commerce to implement it under Section 129, that new determination applies only prospectively to "unliquidated entries of the subject merchandise" "that are entered or withdrawn from warehouse, for consumption *on or after*" the date the USTR directs the Department of Commerce to implement the new decision. 19 U.S.C. 3538(c)(1) (emphasis added).

In the URAA, Congress made clear that the USTR could, after consultation, choose not to alter the administrative action that is the subject of an adverse WTO report. 19 U.S.C. 3538(b)(4) (the USTR "may" direct implementation of a new determination consistent with a WTO report "in whole or in part"); H.R. Doc. No. 316, at 1015; 19 U.S.C. 3533(f)(3) (requiring USTR to consult with the appropriate congressional committees "concerning *whether to implement* the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation" (emphases added)); 19 U.S.C. 3538(b)(4) (USTR "may" direct implementation of a new determination consistent with WTO report "in whole or in part"). Importantly, the political branches could decide not to implement the new determination, but instead compensate the complaining party in some other way. See Dispute Settlement Understanding, Arts. 3.7, 22, 33 I.L.M. at 1227, 1239; H.R. Doc. No. 316, at 1016.

3. Petitioners are two groups of related Japanese corporations that manufacture, export, and import anti-

friction bearings to the United States, JTEKT Corporation and Koyo Corporation of U.S.A. (collectively Koyo), and NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-Bower Corporation (collectively NTN). Pet. ii. In 1989, the Department of Commerce determined that antifriction bearings from Japan (and other countries) were being sold, or likely to be sold, in the United States at less than fair value and issued an antidumping duty order. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904 (1989). Each year thereafter, Commerce has conducted an administrative review of entries during the preceding year.

On July 7, 2000, Commerce initiated the 11th administrative review of that order, covering the period May 1, 1999, through April 30, 2000. On July 12, 2001, Commerce issued the final results of that administrative review, which are the subject of the present litigation. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Order in Part*, 66 Fed. Reg. 36,551; Pet. App. 34a-48a. In the final results, the Department of Commerce explained that it "continued the practice of using zero where the normal value does not exceed the export price * * * in our calculations of overall [dumping] margins" and rejected the contention that its zeroing methodology should be discarded in light of a WTO Appellate Body report that held zeroing in the context of antidumping investigations to be contrary to the Antidumping Agreement. See *Issues and Decision*

Memorandum for the Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom—May 1, 1999, Through April 30, 2000, 66 ITADOC 36,551, 2001 WL 786882, cmt. 38 (2001).

4. Petitioners brought suit in the Court of International Trade challenging, *inter alia*, the Department of Commerce's methodology for calculating the dumping margin. The Court of International Trade sustained the final results in relevant part in a decision dated August 10, 2004. Pet. App. 3a-33a. Applying settled Federal Circuit precedent, the court held that the Department of Commerce reasonably interpreted the relevant statute to permit zeroing (*i.e.*, the practice of counting only positive dumping margins when calculating an aggregate dumping margin) and rejected petitioners' contention that the Department of Commerce's interpretation was unreasonable because it allegedly conflicted with a report issued by the WTO Appellate Body. Pet. App. 17a, 20a-21a.

5. Koyo (but not NTN) appealed the issue of the Department of Commerce's treatment of nondumped sales.[1] On December 8, 2006, the court of appeals affirmed in a judgment without opinion. Pet. App. 1a-2a.

Subsequent to the court of appeals' judgment, the Department of Commerce issued a determination implementing the WTO Appellate Body report in *United States—Laws, Regulations, and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R (Apr. 18, 2006) (*US-Zeroing (EC)*), in which the WTO

[1] NTN also appealed, but limited its appeal to other issues not related to the question presented in the petition for certiorari. See NTN C.A. Br. 2.

body concluded that Commerce's policy of not offseting dumped sales with nondumped sales in initial antidumping investigations was inconsistent with the Antidumping Agreement. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (2006) (*Section 123 Investigations Determination*). In its determination implementing the WTO report, the Department of Commerce announced that it will no longer apply its traditional treatment of nondumped sales in pending and future antidumping *investigations*. *Id.* at 77,723. The determination made clear, however, that it does not apply retroactively to completed investigations, *id.* at 77,725, and does not apply to administrative reviews, the kind of determination at issue in this case, *id.* at 77,724.

Additionally, on January 9, 2007, the WTO Appellate Body issued its report in *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (*US-Zeroing (Japan)*), concluding that the Department of Commere's zeroing methodology in administrative reviews was inconsistent with the Antidumping Agreement. See Pet. App. 53a-54a. That WTO proceeding concerned a challenge to the Department of Commerce's treatment of nondumped sales in administrative reviews generally and also a specific challenge to the Department's determination in the 11th administrative review of antifriction bearings from Japan, the review at issue in the present litigation. See *ibid.* Although the United States criticized the report as "devoid of legal merit," it has stated that it intends to comply with its WTO obligations as determined in the dispute. *Id.* at 57a-58a. The United States has not yet stated how it

intends to comply and has not yet taken any action pursuant to either Section 123 or Section 129 of the URAA.

Both Koyo and NTN asked the court of appeals to stay the mandate pending the United States' response to the WTO report in *US-Zeroing (Japan)*. The court denied petitioners' stay request and also denied their petition for rehearing. Pet. App. 50a-51a.

ARGUMENT

Petitioners do not contend that the Department of Commerce's final results are inconsistent with the antidumping statute, or with Commerce's established policies at the time those results were issued, or even with Commerce's presently stated policies regarding administrative reviews. Rather, petitioners argue (Pet. 18) that the final results are in "violation of the United States' treaty obligations," as construed by the WTO. That argument is one that Congress has expressly foreclosed by specifying that no party can challenge agency action "on the ground that such action * * * is inconsistent with" one of the Uruguay Round Trade Agreements. 19 U.S.C. 3512(c)(1)(B). Nor can petitioners circumvent that limitation by urging the Court to vacate and remand a determination that is concededly proper as a matter of domestic law in order for Commerce to conform that determination to an adverse WTO report. Vacating the final results on that ground would give impermissible judicial effect to the WTO body's report in a context where Congress has specified that such decisions have *no* legal effect "unless and until" the political branches have implemented them. 19 U.S.C. 3533(g)(1).

Petitioners' argument (Pet. 20) that vacatur and remand by this Court are essential to protect "the Executive Branch's ability properly to conduct the nation's

foreign affairs and treaty relationships" is nothing short of absurd. The Executive Branch has not requested vacatur or a remand and instead affirmatively opposes such relief. The relief sought by petitioners would thus interfere with, rather than advance, the Executive Branch's "ability properly to conduct the nation's foreign affairs and treaty relationships." Pet. 20.

As petitioners acknowledge (Pet. 15 n.12), essentially the same arguments that they advance in this petition were recently presented in the petition for a writ of certiorari in *Corus Staal BV* v. *United States*, No. 06-1057, which the Court denied on June 25, 2007, see 127 S. Ct. 3001. The same result is warranted here.[2]

1. Petitioners do not dispute that the Department of Commerce's "zeroing" methodology in administrative reviews is consistent with domestic law. That issue was conclusively determined in the government's favor in litigation to which petitioners were parties. See *Timken Co.* v. *United States*, 354 F.3d 1334 (Fed. Cir.), cert. denied, 543 U.S. 976 (2004). There, in the context of an administrative review, the court of appeals held that, while the antidumping statute does not compel zeroing, *id.* at 1341-1342, Commerce's "zeroing practice is a reasonable interpretation of the statutory language," *id.* at 1342. The court noted that Commerce's construction "makes practical sense," has been upheld repeatedly by the Court of International Trade (both before and after the URAA), and "combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value." *Id.* at 1342-1343. See also

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[2] Although this brief in opposition refers to "petitioners" in the plural, NTN did not challenge Commerce's zeroing methodology before the court of appeals and has therefore waived the issue. See p. 9 & note 1, *supra*; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Corus Staal BV v. *Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (upholding Commerce's policy of zeroing in initial antidumping investigations), cert. denied, 546 U.S. 1089 (2006).

Although petitioners do not challenge the validity of the final results at the time they were issued, petitioners urge the Court to vacate the final results on the basis of "the treaty violations the WTO has identified" in the intervening time. Pet. 12. That argument, however, is foreclosed by the URAA, which expressly provides that no agency action can be challenged on the ground that it conflicts with the Agreements and that only the political branches, and not the courts, can give effect to an adverse WTO report. See 19 U.S.C. 3512(c)(1)(B) ("No person other than the United States * * * may challenge * * * any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with" the Agreements.); H.R. Doc. No. 316, at 659 (WTO panel and Appellate Body reports "will not have any power to change U.S. law or order such a change"; "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.").[3]

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[3] Petitioners repeatedly refer to the Agreements as a "treaty," see, *e.g.*, Pet. 10, 12, 18, but the agreement creating the WTO and bringing the United States as a signatory to the Antidumping Agreement was not presented to the Senate for its ratification as a formal treaty, pursuant to Article II, Section 2, Clause 2, of the Constitution. Rather, the Agreements were entered into as Executive agreements that were then implemented by Congress in the URAA. Exec. Order No. 13,042, 3 C.F.R. 194 (1998); 19 U.S.C. 3511. As noted in the text, Congress has specifically provided that the Agreements have no independent domestic legal effect.

Petitioners cannot circumvent those strictures by casting their argument in terms of "allow[ing] the Executive Branch to reevaluate its earlier decision, thus minimizing the likelihood that the United States will act contrary to its international obligations." Pet. 16-17. The administrative determination at issue in this case—the final results of the 11th administrative review—is concededly consistent with domestic law. For a court to vacate and remand that legally valid agency determination for reconsideration in light of the WTO body's view of the United States' "international obligations" would thus be to give forbidden judicial effect to those Agreements and WTO reports. As Congress has expressly provided, such WTO reports have no legal effect "unless and until" implemented by the political branches pursuant to the statutory processes specified by Congress. 19 U.S.C. 3533(g)(1); *Corus Staal*, 395 F.3d at 1348-1349. Precisely because the political branches have made no determination to give the WTO reports retrospective effect, there is no basis upon which this Court could vacate the final results in the completed administrative review at issue in this case.

2. In an effort to avoid the statutory prohibitions against challenges based directly on the Agreements or WTO reports, petitioners contend that the Department of Commerce has already signaled its own shift in methodology in response to those reports, and urge (Pet. 12-14) that remand is therefore necessary to allow the agency to decide, in the first instance, whether to apply its own new methodology retroactively. See Pet. 12 (remand required in light of the "change in its governing regulations or policies during the pendency of the appeal" and "specific assurances that [the United States] will implement the WTO's rejection of zeroing in all

cases (including *this specific case*)"); *ibid.* (urging remand "for reconsideration in light of the demise of the zeroing procedure"). Contrary to petitioners' characterization, the Department of Commerce's recent pronouncements do not undermine the propriety of its use of zeroing in the 11th administrative review, which is at issue here. As Commerce has made clear, the changes Commerce has made to its methodology in light of the WTO zeroing reports—reports with which the United States strenuously disagrees—have had prospective effect only and cast no doubt on the validity of already completed reviews and investigations.

a. In support of their assertion (Pet. 16) that the Department of Commerce has "subsequently disapproved" of zeroing, petitioners rely in part upon the Department's notice in the *Section 123 Investigations Determination* that it would implement the WTO report in *US-Zeroing (EC)*, which found Commerce's methodology in antidumping investigations to violate the Antidumping Agreement. Pet. 8-9, 14. But what is significant about that determination is that Commerce specifically limited application of the policy change to future antidumping investigations and those still pending before Commerce on the effective date, February 22, 2007. *Section 123 Investigations Determination*, 71 Fed. Reg. at 77,725. Thus, it is clear that Commerce's *Section 123 Investigations Determination* casts no doubt upon the validity of the final results of the administrative review at issue here, which does not involve an investigation and was not pending before Commerce on February 22, 2007.

Although petitioners contend (Pet. 18) that they are "entitled to a decision by the agency whether th[e] change in policy" regarding initial investigations "ap-

plies to Petitioners' pending [*sic*] 'administrative review,'" Commerce has already made clear that it does not. In May, for example, Commerce rejected a similar argument in connection with an administrative review of the antidumping order with respect to Dutch steel. See *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 28,676 (2007). There, several months after the issuance of the *Section 123 Investigations Determination*, and despite the fact that Commerce had already revoked prospectively the antidumping order regarding Dutch Steel pursuant to Section 129,[4] Commerce nonetheless directed Customs to liquidate entries of Dutch steel during the 4th administrative review period at an antidumping duty rate of 2.52%. *Id.* at 28,677. In its decision memorandum, Commerce made clear that "no change has yet been made with respect to the issue of 'zeroing' in administrative reviews," and that therefore "the Department will continue with its current approach to calculating and assessing anti-dumping duties in this administrative review." *Issues and Decision Memorandum for the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review* 14 (2007) <http://ia.ita.doc.gov/frn/summary/nether-

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[4] See *Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261 25,262 (2007) (revoking the antidumping duty order for Dutch steel, but only "with respect to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after" April 23, 2007).

lands/E7-9815-1.pdf>. Commerce further explained that "the Department considers that the Appellate Body report [in *US-Zeroing (EC)*] represents a substantial departure from the understanding of the Antidumping Agreement at the time it was concluded" and Commerce therefore "decline[d] to consider giving any broader retrospective effect to the revocation of the order" in the administrative review proceedings. *Ibid.*

b. Petitioners also rely (Pet. 17) on the United States' general statement that it "intends to comply * * * with its WTO obligations" in connection with the report in *US-Zeroing (Japan)*, which found the United States' "zeroing" practice in administrative reviews to violate the Antidumping Agreement. But the United States has not yet implemented that report, and it has given no indication that compliance would affect retroactively the validity of final results, such as those at issue here, that were completed long before the WTO's ruling. In fact, the United States has made clear that it can "comply with its WTO obligations" without setting aside final administrative review determinations, especially when they have been overtaken by a subsequent administrative review.

(i) The presumption against making retroactive changes in light of adverse WTO reports is clear from the URAA itself. In Section 129 of the URAA, 19 U.S.C. 3538, Congress specified that when the political branches choose to respond to a WTO report by issuing a WTO-compliant determination under that Section, the new determination will "apply with respect to unliquidated entries of the subject merchandise * * * that are entered, or withdrawn from warehouse, for consumption *on or after*" the date upon which the USTR directs implementation. 19 U.S.C. 3538(c)(1) (emphasis added).

Because the entries at issue here necessarily predate any as-yet hypothetical Section 129 implementation of *US-Zeroing (Japan)*, such an implementation could have no effect upon this case.

(ii) Likewise, if the political branches choose to implement the report in *US-Zeroing (Japan)* through a more general change in methodology, as provided in Section 123 of the URAA, such a change would not necessarily benefit petitioners with respect to the present administrative review, which was concluded long before the WTO report and any implementing determination. As noted above, the Department of Commerce made clear in its Section 123 implementation of *US-Zeroing (EC)* that a change in methodology pursuant to that Section need not undermine the validity of final agency determinations that predate the modification. See *Section 123 Investigations Determination*, 71 Fed. Reg. at 77,725 (limiting application of change in methodology under Section 123 "to all investigations pending before the Department as of the effective date").

(iii) Petitioners contend (Pet. 12) that the United States "has assured the WTO * * * that the Department of Commerce (and not the courts) will decide whether to reopen completed investigations in light of subsequent rule changes." But Commerce has made no such assurances.

Petitioners rely on a brief filed by the United States before a WTO panel, see Pet. 12, 17 (citing Pet. App. 66a), but petitioners misconstrue the United States' WTO representations by a considerable degree. In the filing cited by petitioners, the United States was responding to a challenge by Canada that United States law violates the WTO "as such," or per se, because it categorically "preclud[es] the Department of Com-

merce" from giving retrospective application of methodological changes "to prior unliquidated entries." Pet. App. 63a (quoting Canadian submission). In response, the United States observed that while Congress has specified that a Section 129 determination has only prospective affect on future entries, that Section "does not mandate that Commerce take (or preclude Commerce from taking) any particular action in any separate segment of the proceeding," such as a later administrative review. *Id.* at 64a. Thus, the United States informed the WTO panel, in "any *subsequent* administrative review," *id.* at 66a (emphasis added), *i.e.*, one initiated after the Section 129 determination, "nothing in section 129(c)(1) would preclude Commerce from applying its new, WTO-consistent methodologies in the administrative review," *ibid.* See also *ibid.* (noting that if, after a Section 129 determination were made, "a company *were then* to request an administrative review," Commerce would decide what effect to give that determination in the context of the subsequently initiated review) (emphasis added). Nothing in the United States' WTO brief suggests that a Section 129 determination could provide a basis for the courts to vacate and remand for further agency action already completed administrative reviews.

(iv) Finally, petitioners are mistaken in their fundamental premise that "[t]he United States cannot fulfill its diplomatic commitments regarding this administrative review" without a remand. Pet. 10. Petitioners assume that in order for the United States to "comply fully with its treaty obligations in light of the WTO's decision in *US-Zeroing (Japan)*, which extends to the administrative review that is the subject of this appeal," *ibid.*, the United States must apply any change in methodology retrospectively to the 11th administrative review.

Petitioners are mistaken. To the extent that the Executive possesses discretion to grant retrospective relief, it has no obligation to do so.

The United States' report to the WTO with respect to its implementation of *US-Zeroing (EC)* reflects the United States' understanding that the Agreements do not require retrospective application of a WTO report to administrative reviews that have been superseded by reviews for subsequent periods. There, the European Communities had brought a general challenge to Commerce's zeroing methodology in initial investigations and specific challenges to particular investigations and administrative reviews. On April 13, 2007, the United States submitted a Status Report detailing its implementation of the adverse WTO report. See App., *infra*, 1a-3a. The United States noted that, as announced in the *Section 123 Investigations Determination*, Commerce would "no longer perform average-to-average comparisons in antidumping investigations without offsets." App., *infra*, 2a. In addition, with respect to the 15 antidumping investigations that had been specifically challenged, Commerce had either revoked the antidumping orders or issued new determinations "us[ing] an average-to-average comparison in which offsets were provided." *Ibid.*

With respect to the challenged *administrative reviews*, however, the United States found that no change was required in order to comply with the WTO report. The Status Report explained that "[w]ith respect to the assessment reviews at issue in this dispute, in each case the results were superseded by subsequent reviews. Because of this, no further action is necessary for the United States to bring the challenged measures into

compliance with the recommendations and rulings of the" WTO. App., *infra*, 3a.[5]

The 11th administrative review at issue in the present litigation has likewise been superseded by the final results of administrative reviews for subsequent time periods. See, *e.g.*, *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 67 Fed. Reg. 55,780 (2002) (for the period May 1, 2000, through April 30, 2001); *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 71 Fed. Reg. 40,064 (2006) (for the period May 1, 2004, through April 30, 2005). Thus, as with the European Communities case, in which the United States did not give the WTO report retrospective effect as to superseded reviews, the administrative review at issue here no longer serves as the basis for collecting antidumping duties on new entries.

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[5] The Agreements only contemplate prospective compliance with a WTO report. While compliance would entail, for example, ceasing to collect antidumping duties on new entries after the conclusion of the implementation period based on a dumping margin that was calculated in an impermissible manner, prospective compliance does not, in the United States' view, preclude continued liquidation of entries that occurred prior to the conclusion of the implementation period. The focus on the date of entry rather than date of liquidation reduces any inconsistency among countries in the effect of WTO reports depending upon such technicalities as whether a country utilizes a liquidate-and-refund method, in which duties are liquidated at the time of entry subject to possible refund if challenged, or, as in the United States, a deposit-and-liquidate approach, under which duties are conditionally deposited at the time of entry subject to liquidation after any challenge is concluded.

3. Neither the changes in methodology that Commerce has made in response to the *US-Zeroing (EC)* report, nor the as-yet-unimplemented WTO report in *US-Zeroing (Japan)*, undermines the validity of the final results at issue in this case. Thus, there is no basis for this Court to remand in order to permit Commerce to decide "whether to implement the WTO's rejection of zeroing in this administrative review as it had in pending and future investigations." Pet. 15. Because there has been no change in policy with respect to administrative reviews, the principle cited by petitioners—that a court should remand following an agency's change in policy to permit the agency to determine in the first instance the extent to which the policy change should be applied retroactively—is simply inapposite. Pet. 12-14 (citing *NLRB* v. *Food Store Employees Union*, 417 U.S. 1 (1974); *Panhandle E. Pipe Line Co.* v. *FERC*, 890 F.2d 435, 438-449 (D.C. Cir. 1989); *Williston Basin Interstate Pipeline Co.* v. *FERC*, 165 F.3d 54, 62-63 (D.C. Cir. 1999); *National Fuel Gas Supply Corp.* v. *FERC*, 899 F.2d 1244, 1249-1250 (D.C. Cir. 1990)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2007

APPENDIX

World Trade Organization

WT/DS294/20/Add.2
13 April 2007
(07-1493)

Original: English

UNITED STATES—LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

Status Report by the United States

Addendum

The following communication, dated 12 April 2007, from the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.6 of the DSU.

Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (WT/DS294)

The United States submits this report in accordance with Article 21.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes.*

On 9 May 2006, the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in *United States—Laws, Regulations and Methodology for Calcu-*

lating Dumping Margins ("*Zeroing*") (DS294). At the following DSB meeting on 30 May 2006, the United States informed the DSB of its intention to implement the recommendations and rulings of the DSB in connection with this matter. On 28 July 2006, the United States and the European Communities agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB would end on 9 April 2007.

On 6 March 2006, the US Department of Commerce ("Commerce") published a notice requesting comments on its intention to no longer perform average-to-average comparisons in antidumping investigations without offsets. On 26 January 2007, Commerce published a notice that the date after which it would no longer perform such comparisons would be 22 February 2007. Accordingly, as of 22 February 2007, the United States is no longer performing average-to-average comparisons in antidumping investigations without offsets.

With respect to the 15 anti-dumping investigations at issue in this dispute, three had already been revoked. These are: Certain Cut-to-Length Carbon-Quality Steel Plate from France (revoked 7 December 2005), Certain Stainless Steel Sheet and Strip in Coils from France (revoked 4 August 2005), and Certain Stainless Steel Sheet and Strip in Coils from the United Kingdom (revoked 4 August 2005). With respect to the remaining 12, on 9 April 2007, Commerce issued 11 determinations. In those determinations, Commerce used an average-to-average comparison in which offsets were provided. As a result, in two of these determinations, Commerce found no dumping. These are: Certain Hot-Rolled Steel from the Netherlands and Stainless Steel Wire Rod from

Sweden. The margins for the others were adjusted accordingly, and in several cases, Commerce found no dumping by individual companies. With respect to the 15th investigation, the respondent has alleged a clerical error in the original investigation, and Commerce is investigating the allegation further.

With respect to the assessment reviews at issue in this dispute, in each case the results were superseded by subsequent reviews. Because of this, no further action is necessary for the United States to bring the challenged measures into compliance with the recommendations and rulings of the DSB.

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No. 06-1632

IN THE

Supreme Court of the United States

JTEKT CORPORATION (F/K/A/ KOYO SEIKO COMPANY, LTD.), KOYO CORPORATION OF U.S.A., NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., AND NTN-BOWER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

In opposing the Petition, both the Solicitor General ("SG") and intervenor Timken US Corporation ("Timken") entirely miss the point. The United States has announced that it will implement the WTO's January 9, 2007 decision that the practice of "zeroing" violates the United States' treaty obligations in *this* administrative review. See Pet. at 10 (citing Pet. App. 58a-60a); Gov't of Japan *Amicus* Br. at 2-3, 6-7. Had this case been brought in the D.C. Circuit, the court of appeals would have remanded to the Department of Commerce to allow that agency to discharge its responsibility to determine how to implement the WTO's decision. See *Panhandle E. Pipe Line Co.* v. *FERC*, 890 F.2d 435, 438-39 (D.C. Cir. 1989). This longstanding rule preserves agency authority and avoids judicial encroachment on an exclusive function of the Executive Branch. The Federal Circuit's refusal to order a remand in this case creates an unnecessary conflict in the law governing federal agencies.

A remand is critical here, because without it, there is simply no way for Commerce to determine how to implement the WTO's holding that the United States violated its treaty obligations when it zeroed petitioners' negative dumping margins: once petitioners' entries are liquidated, there is no mechanism by which the Executive Branch may reconsider its disposition of an administrative proceeding and "reliquidate" the entries. Thus, the failure to remand will prevent the Executive Branch from fulfilling its promise to the WTO and Japan that it will implement the WTO decision by December 24, 2007. Pet. App. 58a-60a. The SG and Timken never explain how Commerce can fulfill this diplomatic assurance if the very administrative review as to which the United States announced its intent to implement the WTO ruling is allowed to pass forever beyond the reach of the agency. These results would not have occurred in the D.C. Circuit, and a writ of

certiorari is warranted to correct the Federal Circuit's error and eliminate the conflict.

Rather than grapple with this fundamental point, the SG and Timken attempt to confuse matters. Both argue that the statute only allows "prospective" implementation of WTO decisions. See SG Opp. at 17-18; Timken Opp. at 19-22 (citing Uruguay Round Agreements Act of 1994 ("URAA"), Pub. L. No. 103-495, § 129(c), 108 Stat. 4809, 4836 (codified at 19 U.S.C. § 3538(c))). This assertion, however, flatly contradicts assurances the United States has made to its treaty partners that Commerce *can* implement WTO decisions in existing administrative proceedings like this one, without reference to Section 129(c). See Pet. at 17; Pet. App. 66a-67a. Indeed, the WTO relied on this express assurance in dismissing a challenge to Section 129(c) brought by the Government of Canada, which contended that prospective-only implementation (the same interpretation the SG and Timken advance here) would violate the plain requirements of the Anti-Dumping Agreement. See Pet. at 17.

The SG and Timken also elide the fact that the United States has assured both the WTO and Japan that it will implement the WTO's decision that zeroing was improperly applied in this administrative review. See Pet. at 10 (citing Pet. App. 58a-60a); Gov't of Japan *Amicus* Br. at 2-3, 6-7. The opponents apparently argue that because Commerce chose not to implement *other* WTO decisions retrospectively (in cases that were *not* the subject of the WTO's decision at issue here), the federal courts should simply assume that Commerce will follow the same course here. But this assumption is not for the courts to make, as the D.C. Circuit expressly recognizes.

The SG and Timken are, of course, entitled to make all their arguments if and when this Court hears this case on the merits. But they are misplaced in opposition to the Petition. The Federal Circuit has opened a clear and unnecessary conflict in the law governing federal agencies, and in doing so

has interfered with Commerce's ability to discharge the United States' international obligations. A writ of certiorari should be granted.

I. THE INTERPRETATION OF SECTION 129(c) ADVANCED BY THE SG AND TIMKEN CONTRADICTS THE INTERPRETATION ADVANCED BY THE UNITED STATES TO ITS TREATY PARTNERS.

1. The SG and Timken argue that the Federal Circuit need not have remanded this case to Commerce because Section 129(c) of the URAA limits implementation of WTO decisions to entries that occur after the implementation decision is reached. The SG and Timken interpret this provision to mean that Commerce cannot implement the WTO's decision in this case, see SG Opp. at 17-18; Timken Opp. at 19-22, despite the fact the WTO's decision was directed expressly to this case and the United States has assured its treaty partners that it will fully implement the WTO's ruling.

The USTR and Commerce are statutorily charged with implementing the URAA. See 19 U.S.C. §§ 3533(g), 3538. And those agencies, in defending the validity of Section 129(c), have assured the WTO that the section does *not* limit Commerce's authority to implement the WTO's decisions as to entries that predate the change in policy. In fact, in providing that assurance, the United States relied expressly on the possibility of a judicial remand where, as here, a WTO decision results in a change to U.S. policy:

> In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.
>
> ... The only impact of section 129(c)(1) ... is that Commerce would not determine the fate of those pre-implementation entries in the revocation determination itself. Section 129(c)(1) does not require Commerce to apply duties to those entries, it does not limit

> Commerce's discretion in deciding how to administer the law in separate segments of the proceeding with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit Commerce's obligation to implement the results of any such judicial proceedings.

Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act* ¶¶ 19-20, WT/DS221 (Mar. 8, 2002), Pet. App. 66a-67a (emphasis and footnote omitted). Thus, according to the United State's own submission, if a judicial proceeding "results" in a remand to allow the agency to reconsider its disposition of entries because it has decided to implement a WTO ruling, Section 129 poses no obstacle to such reconsideration.

Based largely on this assurance, the WTO ruled that the United States was not in violation of its treaty obligations. See Panel Report, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act* ¶¶ 6.82-6.83, WT/DS221/R (July 15, 2002).[1] This interpretation continues to animate the United States' interpretation of the statute in its statements to the WTO, inasmuch as it has informed the WTO that it will implement the WTO's decision in this case, notwithstanding the fact that this administrative review predates the implementation decision. See Gov't of Japan *Amicus* Br. at 2-3, 6-7.

The interpretation of Section 129(c) advanced by the responsible agencies in defending its validity before the WTO, and in conducting the foreign relations of the United

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[1] The SG attempts to rewrite history in claiming that petitioners "misconstrue the United States' WTO representations." *See* SG Opp. at 18-19. The SG's carefully chosen citations from the submission—which stand for the unremarkable proposition that Commerce may apply a WTO decision to future administrative reviews—conveniently omit the section quoted above, which directly refuted Canada's arguments.

States in this case, is entitled to deference. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The SG's and Timken's contrary (and belated) litigation position is not.

2. The SG, apparently realizing that its absolutist reading of Section 129(c) is incorrect, also argues that "to the extent that *the Executive possesses discretion to grant retrospective relief*, it has no obligation to do so." SG Opp. at 20 (emphasis added). This is true, but irrelevant. As explained below, petitioners are not claiming that they could compel the Executive to implement the WTO's ruling, or force it to implement that ruling in any particular way. Petitioners' argument, rather, is that, under the D.C. Circuit's remand rule, the Executive would have been afforded the opportunity to decide whether to implement and, now that it has announced it will do so, to decide how to implement. The Federal Circuit's failure to remand will prevent the Executive from discharging its treaty obligations and stated intent to its treaty partners.

3. Finally, the SG and Timken appear to argue that a remand would be futile because Commerce might adopt their interpretation in this case—*i.e.*, that Section 129(c) prevents retrospective implementation to the administrative review at issue here, despite the United States' assurances to the contrary. But this type of uncertainty is precisely why the D.C. Circuit remands cases to the agency. If Commerce decides to interpret Section 129(c) to deny petitioners the relief it has already promised, petitioners can challenge that interpretation on direct appeal (and, undoubtedly, the Nation's treaty partners will also challenge it before the WTO). But this is plainly not a reason to deny a remand in the first place.

II. THE UNITED STATES HAS ASSURED ITS TREATY PARTNERS THAT IT WILL IMPLEMENT THE WTO'S DECISION IN THIS CASE.

The SG and Timken also argue that there was no need for the Federal Circuit to have followed the D.C. Circuit's remand rule because Commerce has not yet announced how it will implement the WTO's decision in this case. SG Opp. at 17; Timken Opp. at 25-27. The logic of this argument is inverted—the fact that Commerce has not decided how to implement is *exactly* why the Federal Circuit should have followed the D.C. Circuit's rule and remanded to the agency.

1. The United States has announced that it will implement the WTO's decision, which applies to this administrative review. See Pet. at 10, 17-18; Pet. App. 58a-60a; Gov't of Japan *Amicus* Br. at 2-3, 6-7. Commerce has discretion to decide how to accomplish this, and the existence of such discretion is precisely why the D.C. Circuit remands cases to agencies for further consideration: federal courts should not presume to predict how an agency will implement an announced change in policy in a particular case, and thus it is necessary to remand those cases for further proceedings. See, *e.g.*, *NLRB* v. *Food Store Employees Union*, 417 U.S. 1, 10 n.10 (1974); *Panhandle*, 890 F.2d at 438-39 ("because we are at liberty neither to evaluate the Commission's decision under FERC's *old* policy[,] nor to assess on our own how Panhandle's tariffs would fare under FERC's *new* policy, we are required to remand so that the Commission may indicate how, if at all, its decision would be affected by its intervening policy change"). Timken and the SG simply have it backwards.

2. Timken and the SG also make the curious argument that "Commerce [has only] adopted a change in investigations, [and has] expressly declined invitations to apply the change to other types of determinations, such as annual reviews." Timken Opp. at 16-17, 23; see also SG Opp. at 15-17. But they rely on the United States' implementation of a different

WTO decision—*i.e.*, its 2006 decision that zeroing violates the United States' treaty commitments when used in antidumping investigations. See SG Opp. at 15-16, 18; Timken Opp. at 23-24 (citing *Antidumping Proceedings*, 71 Fed. Reg. 77,722, 77,724 (Dec. 27, 2006)). In announcing its change of policy pursuant to that decision, Commerce explained that because the WTO's decision was limited to investigations, the change in policy was likewise limited to investigations. 71 Fed. Reg. at 77,724. The SG also relies on a later decision by Commerce not to extend the WTO's 2006 decision to a particular administrative review involving imports of Dutch steel, as to which the underlying antidumping order had been revoked pursuant to the WTO's 2006 decision. SG Opp. at 16. Again, Commerce's decision in the Dutch steel administrative review is irrelevant because, unlike here, it did not purport to implement a WTO decision related to the specific administrative review at issue, and the United States had not expressly stated its intent to implement a WTO decision governing that very review. The SG and Timken ignore these critical distinctions.[2]

The SG and Timken thus misrepresent petitioners' argument: petitioners are not claiming, and have never claimed, that this case should have been remanded because Commerce's decisions regarding investigations should also apply to administrative reviews.[3] Rather, the United States

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[2] Timken also points out that the United States has expressed some opposition to the WTO's decision in this case and has proposed that, in the future, zeroing should be allowed under the Anti-Dumping Agreement. *See* Timken Opp. at 14. Petitioners do not fathom the relevance of this argument. The United States may propose to its treaty partners that they consider changing the rule in the future, but this does not change the fact that the United States has committed to fully implement the WTO's decision in this case.

[3] The SG mischaracterizes petitioners' argument that a remand was necessary to allow Commerce to decide whether to implement the WTO's decision regarding this administrative review, based on its decision to implement the WTO's earlier ruling regarding investigations. *See* SG

itself announced that it would change the policy governing the administrative review involved here, but its ability to implement that change is stymied by the Federal Circuit's failure to follow the D.C. Circuit's remand rule. The *only* way the Executive Branch can discharge its assurances to treaty partners in this case is if the federal courts relinquish their jurisdiction and remand to Commerce. The Federal Circuit's refusal to do so is at odds with the D.C. Circuit's rule and interferes with the Executive Branch's ability to conduct the foreign affairs of the United States. Each is a sufficient reason to grant a writ of certiorari.

III. THE SG'S ARGUMENT THAT THERE IS NO PRIVATE CAUSE OF ACTION TO ENFORCE A WTO DECISION IS INAPPOSITE.

The SG argues that petitioners are attempting to enforce the WTO's decision directly, and no private cause of action exists for them to do so. *Id.* at 11-14. This argument is mistaken. Petitioners asked the Federal Circuit to remand to the agency (as the D.C. Circuit routinely does) in light of the need for Commerce to consider whether and how to implement an intervening WTO decision covering this very case, which the USTR later announced it would implement. As the Petition makes clear, the Federal Circuit's decision not to remand has rendered impossible the process by which Commerce would decide upon the proper implementation of the WTO decision.

Opp. at 16-17 (quoting Pet. at 17). Petitioners do not argue that Commerce should apply its December 27, 2006 discontinuation of zeroing to administrative reviews; rather, petitioners argue that the WTO's intervening decision in January 2007 (which the SG ignores) that zeroing also violated the Anti-Dumping Agreement when used in this administrative review should result in a remand for Commerce to decide how to implement *that* decision. Petitioners referred to Commerce's 2006 decision regarding investigations only to show that Commerce was likely to implement in the current case as well—which, shortly thereafter (in February 2007), the United States announced it would do.

Remanding to the agency to consider how to implement the change in policy does not usurp Commerce's statutory authority, nor does it compel Commerce to make any particular decision. It certainly bears no resemblance to a "private cause of action" under the Anti-Dumping Agreement. Instead, it *preserves* the agency's authority, which is the entire basis for the D.C. Circuit's remand rule. See, *e.g.*, *Panhandle*, 890 F.2d at 438-39 ("we are required to remand so that the Commission may indicate how, if at all, its decision would be affected by its intervening policy change").[4]

IV. TIMKEN'S ARGUMENT THAT THE FEDERAL CIRCUIT SHOULD NOT HAVE "INTERJECTED" ITSELF IN THE EXECUTIVE BRANCH'S PROCESS SUPPORTS PETITIONERS.

Timken argues that consideration of how to implement a WTO decision is committed exclusively to the Executive Branch, and the Federal Circuit should not have "interjected" itself in the process. Timken Opp. at 27-29. Petitioners could not agree more. But this does not support the SG's and Timken's position. To the contrary, the Federal Circuit "interjected" itself in the Executive Branch's implementation process when it refused to remand this case to the agency.

Despite the SG's and Timken's attempts to deflect the issue, the Court should be under no illusions about the effect of denying certiorari in this case. Unless the Federal Circuit's unreasoned decision not to remand this case is reviewed and reversed, the dumping determination in this administrative review will stand and Commerce will be permanently prevented from fulfilling the United States' announced intent

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[4] The Court of International Trade has repeatedly rejected the argument the SG makes here. *See, e.g.*, *Tembec, Inc.* v. *United States*, 441 F. Supp. 2d 1302, 1318-20 (Ct. Int'l Trade 2006) (per curiam); *Timken Co.* v. *United States*, 240 F. Supp. 2d 1228, 1238 (Ct. Int'l Trade 2002), *aff'd*, 354 F.3d 1334 (Fed. Cir. 2004).

to implement the WTO's decision in this case. Perhaps, as the SG and Timken predict, Commerce will decide that only prospective implementation is necessary, a decision the Nation's treaty partners could challenge before the WTO. But the ultimate outcome of Commerce's process is irrelevant to whether the Federal Circuit should have followed the D.C. Circuit's rule and remanded to the agency to allow it to make the decision in the first instance. *This* is the issue that warrants a writ of certiorari. The Federal Circuit's failure to follow the prevailing rule interferes with Commerce's review process and prevents it from fulfilling the United States' treaty obligations and its assurances to its treaty partners that it will implement the WTO's decision in this administrative review. Application of the D.C. Circuit's remand rule would avoid these untoward results.

A writ of certiorari is warranted to correct the Federal Circuit's error.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition, a writ of certiorari should be granted.

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No. 06-1632

IN THE

Supreme Court of the United States

JTEKT CORPORATION (f/k/a/ KOYO SEIKO COMPANY, LTD.), KOYO CORPORATION OF U.S.A., NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., AND NTN-BOWER CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

THE GOVERNMENT OF JAPAN'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 06-1632

JTEKT CORPORATION (f/k/a/ KOYO SEIKO COMPANY, LTD.), KOYO CORPORATION OF U.S.A., NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., AND NTN-BOWER CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MOTION OF GOVERNMENT OF JAPAN FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2(b) and in accordance with Supreme Court Rules 21.2(b) and 33.1, the Government of Japan hereby moves this Court for permission to file an *Amicus Curiae* Brief in support of the Petition for a Writ of Certiorari filed by petitioners JTEKT Corporation, (f/k/a/Koyo

Seiko Company, Ltd.), Koyo Corporation of U.S.A., NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-Bower Corporation in the above-captioned case. The Government of Japan's proposed Amicus Brief is attached. As demonstrated below, leave should be granted because the Amicus Brief provides relevant information to the Court not provided by the Parties, and the Government of Japan has a strong interest in this appeal. The arguments in favor of granting this Motion are provided in further detail below.

Counsel for Petitioners and Respondent United States consented to the Government of Japan's submission of an amicus curiae brief. The only party withholding consent is Respondent Timken U.S. Corporation. Letters representing written consent and opposition have been filed with the Clerk of this Court in accordance with Supreme Court Rule 37.2(a).

Among the issues examined in this case is the U.S. Department of Commerce's (the "Commerce Department") "zeroing" practice. As discussed in further detail in the attached Amicus Brief, the World Trade Organization ("WTO") recently ruled that application of zeroing in Commerce Department administrative reviews is inconsistent, both facially and as applied to the specific review at issue in this appeal, with the United States' obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "WTO Anti-dumping Agreement"). *United States – Measures Relating to Zeroing and Sunset Reviews*, Report of the Appellate Body, WT/DS322/AB/R, at para. 190(c) (Jan. 9, 2007). The United States has announced its intent to fully comply with that ruling. U.S. Statements at the WTO Dispute Settlement Body Meeting, Delivered by David P. Shark, Deputy Chief of Mission, U.S. Mission to the WTO, at 3 (Feb. 20, 2007), *available at* http://www.usmission.ch/Press2007/0220DSB.

html. However, the United States has been unable to comply with the ruling as it relates to the specific review at issue in this case because the U.S. Court of Appeals for the Federal Circuit (the "Federal Circuit") refused to remand the review back to the Commerce Department.

The refusal of the Federal Circuit to remand the review back to the Commerce Department precludes the United States from complying with its international obligations under the WTO Antidumping Agreement. Also, the Federal Circuit's refusal effectively forces the United States to ignore the specific commitment it made to Japan and other WTO Members to comply with the WTO ruling, having potentially adverse consequences on the United States' relationship with other WTO Members, particularly Japan, and on the legitimacy of the WTO dispute settlement system. No less significant, the number of Japanese exporters aggrieved, and the level of harm they incurred, as a result of zeroing in the review at issue, reinforces the Government of Japan's stake in the outcome of this appeal.

With significant legal, economic and diplomatic considerations implicated in this case, the Government of Japan is able to provide relevant information that other Parties are unable to adequately convey. Moreover, as a WTO Member and the complaining party in the dispute giving rise to the WTO's ruling, the Government of Japan has a strong interest in this appeal. Therefore, the Government of Japan wishes to present its views, through the attached Amicus Brief, regarding the considerations bearing on this Court's decision to review the Federal Circuit's decision, as well as the importance of such review.

Based on the foregoing, the Government of Japan respectfully asks this Court for leave to file the attached *Amicus* Brief.

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IN THE

Supreme Court of the United States

No. 06-1632

JTEKT CORPORATION (f/k/a/ KOYO SEIKO COMPANY, LTD.), KOYO CORPORATION OF U.S.A., NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., AND NTN-BOWER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF GOVERNMENT OF JAPAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

Amicus curiae submitting this brief is the Government of Japan, in its own capacity and on behalf of Japan.[1] The Gov-

[1] Counsel for Petitioners and Respondent United States consented to the Government of Japan's submission of an *amicus curiae* brief. The only party withholding consent is Respondent Timken U.S. Corporation. Letters representing written consent and opposition have been filed with the Clerk of this Court in accordance with Supreme Court Rule 37.2(a). No counsel for any party has authored this brief, in whole or in part, and

ernment of Japan does so in support of the Petition for a Writ of Certiorari filed by JTEKT Corporation, (f/k/a/Koyo Seiko Company, Ltd.), Koyo Corporation of U.S.A., NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-Bower Corporation. The Government of Japan has a strong interest in the outcome of this case and, thus, urges that the Petition be granted.

Japan is a member of the World Trade Organization ("WTO") and was the complaining party in the WTO dispute central to this case and giving rise to the WTO Appellate Body's ruling that the U.S. Department of Commerce's (the "Commerce Department") use of zeroing is inconsistent with the United States' obligations under the WTO agreements. The decision of the U.S. Court of Appeals for the Federal Circuit (the "Federal Circuit"), however, severely limits the United States' ability to comply with those obligations. More specifically, it interferes with the United States' ability to honor its commitment to WTO Members, including Japan, to implement the decision of the WTO Appellate Body addressing the underlying agency determination at issue in this case, effectively endorsing the United States' continued violation of its international obligations. Therefore, through this brief, the Government of Japan wishes to convey the importance of this Court's review of the Federal Circuit's decision.

SUMMARY OF ARGUMENTS

The decision by the Federal Circuit in this case has imposed an unavoidable barrier to the United States honoring its commitment to Japan and other WTO Members to comply fully with the WTO decision at issue in this case. The Com-

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no person or entity other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

merce Department has no ability to reconsider and address the underlying issue in this case unless the case is first remanded to the agency to allow it to address the WTO decisions at issue as they relate to this specific proceeding. Yet, the Federal Circuit has refused to do so, allowing the Commerce Department to assess final antidumping duties in accordance with U.S. law and thereby rendering the entire case moot. The United States' commitment to Japan to comply fully with the WTO decision in this case will be breached.

There is no reason for the judiciary to hold this case hostage, and refuse to send it back to the Executive Branch for an agency decision. This Court has explained that international obligations should be considered when interpreting U.S. statutes, that intervening policy changes should be considered when agencies interpret their statutes, and that deference to an agency decision depends on the agency considering the specific international obligations and the specific intervening developments. The solution is simple. This case should be remanded to the Commerce Department to allow it to reconsider its decision based on the recent, significant developments that affect this case.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION PREVENTS THE UNITED STATES FROM FULFILLING ITS TREATY OBLIGATIONS TO JAPAN, CONTRARY TO THE EXECUTIVE BRANCH'S EXPRESS AND UNAMBIGUOUS INTENT.

The Federal Circuit's refusal to remand this case to the Commerce Department effectively forces the United States Government to breach its WTO obligations. We detail below the WTO obligations at issue in this case, and the reasons that a remand by the Federal Circuit is required to allow the United States to honor those obligations.

The United States has accepted international obligations under the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") that established the WTO during the Uruguay Round of multilateral trade negotiations.[2] Article II of the WTO Agreement specifies the individual trade agreements that apply to WTO Members. In addition, "Article II provides that by accepting membership in the WTO, each government will automatically become a party to 18 agreements and legal instruments, referred to as '[M]ultilateral [T]rade [A]greements' (MTAs)."[3] These agreements and legal instruments are "integral parts of the [WTO] Agreement, binding all Members."[4] Section 101 of the Uruguay Round Agreements Act sets forth Congressional approval for those agreements and, thus, the United States' acceptance of its WTO obligations.[5]

The two WTO agreements at issue here are (a) the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "WTO DSU")[6], and (b) the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "WTO Antidumping Agreement").[7]

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[2] *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. XVI(4), *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 6, 17 (1994), 33 I.L.M. 1144, 1152 (1994) [hereinafter WTO Agreement].

[3] Uruguay Round Agreements Act, Statement of Administrative Action, H.R. DOC. NO. 103-316, at 660 (1994) [hereinafter SAA].

[4] *Id.*

[5] Pub. L. No. 103-465, 108 Stat. 4814-15 (1994), *codified at* 19 U.S.C. § 3511 (2007).

[6] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement at Annex 2.

[7] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement at Annex 1A.

The WTO DSU governs disputes arising under each of the various WTO agreements. The WTO DSU reflects the successful accomplishment of one of the United States' principal negotiating objectives in the Uruguay Round.[8] Among the most important changes (from the prior GATT dispute settlement mechanism) effected by the WTO DSU were:

- imposition of stringent time limits for each stage of the dispute settlement process;
- creation of an Appellate Body to review panel interpretations of WTO agreements and legal issues; and
- automatic adoption of panel or Appellate Body reports.

See SAA at 339. In particular, we note that Article 21.1 of the WTO DSU provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."

The WTO Antidumping Agreement sets forth rules governing the determination of dumping and the imposition of offsetting antidumping duties. (In the United States, those tasks are administered primarily by the Commerce Department.) By becoming a WTO member and, thus, bound by the WTO Antidumping Agreement, the United States specifically agreed to conform its antidumping practices to the terms of that treaty. WTO Antidumping Agreement at art. 1; WTO Agreement at art. II:2.

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[8] *See* SAA at 339. *See also* GAO Report: International Trade: Implementation Issues Concerning the World Trade Organization, GAO/T-NSIAD-96-122 (March 13, 1996) ("The United States negotiated for a strengthened dispute settlement regime during the Uruguay Round. In particular, the United States sought time limits for each step in the dispute settlement process and elimination of the ability to block the adoption of dispute settlement panel reports.").

Ensuring that the United States honors its obligations under these two WTO agreements is the centerpiece of the Government of Japan's position. In January 2007, in response to a dispute initiated by Japan against the United States under the WTO's dispute settlement procedures, the WTO Appellate Body issued a finding that the Commerce Department's practice of "zeroing" in antidumping duty calculations is inconsistent with various provisions of the WTO Antidumping Agreement.[9] *United States—Measures Relating to Zeroing and Sunset Reviews*, Report of the Appellate Body, WT/DS322/AB/R, at para. 190 (Jan. 9, 2007) [hereinafter *U.S.—Zeroing*]. Importantly, that decision, which covered the very agency determination at issue in this case, held that the Commerce Department's zeroing practice, *inter alia*, does not ensure a "fair comparison," as required by Article 2.4, and otherwise does not comply with obligations under the WTO Antidumping Agreement. *Id.* at paras. 146-147, 167-169, 176-177. The WTO Appellate Body's ruling is final and unequivocal: *zeroing in reviews violates the United States' obligations under the WTO Anti-dumping Agreement*. Moreover, as noted above, *that ruling specifically addressed the very agency determination at issue in this case*.

The United States understands these obligations, as it unambiguously expressed its intent to comply with the WTO Appellate Body's ruling, including the obligation to comply with the ruling as it applies to the specific review at issue. U.S. Statements at the WTO Dispute Settlement Body Meet-

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[9] The WTO Appellate Body also found the Commerce Department's zeroing practice inconsistent with Article VI:2 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), another agreement which is part of the WTO Agreement binding the United States. For ease of reference, in this brief the Government of Japan simply references inconsistencies with the WTO Antidumping Agreement. However, it is the Government of Japan's intention that such references also incorporate inconsistencies with GATT 1994.

ing, Delivered by David P. Shark, Deputy Chief of Mission, U.S. Mission to the WTO, at 3 (Feb. 20, 2007), available at http://www.usmission.ch/Press200/0220DSB.html. As stated by the United States Trade Representative, "the United States . . . intends to comply in this dispute with its WTO obligations and will be considering carefully how to do so." *Id.*[10] This expressed intent—which resulted in part from Japan's request to the United States that the latter fully implement the Appellate Body's decision—is unqualified and is mandated under the WTO Agreements. Therefore, the United States has committed to Japan, and all other WTO Members, that it will fully implement the Appellate Body's decision by December 24, 2007. And recalculation of the dumping margins without zeroing is necessary for the United States to fully implement that decision.

The United States, however, will not be able to fulfill its international obligations unless the case is remanded to the Commerce Department to allow the agency to decide how to implement the WTO's decision. The reason is very simple: Unless the case is remanded to the Commerce Department for further consideration, the challenged import entries will be liquidated by operation of U.S. law (because there will be a final resolution of litigation surrounding the agency determination). Once the import entries are liquidated the Commerce Department has no legal authority to modify the underlying antidumping determination to comply with the WTO Appellate Body decision.[11] In short, a remand is re-

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[10] *See also United States—Measures Relating to Zeroing and Sunset Reviews*, Agreement on Reasonable Period of Time, WT/DS322/20 (May 8, 2007) (the United States committing to Japan it will "bring its measures, . . . found to be inconsistent with the *Anti-dumping Agreement*, into conformity under those Agreements"), *available at* Petition for a Writ of Certiorari of JTEKT Corp., *et al.*, at Appendix G (59a-60a), *JTEKT Corp. v. United States*, No. 06-1632 (June 6, 2007).

[11] *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983) ("The statutory scheme has no provision permitting reliquida-

quired to allow the Judiciary Branch to appropriately return the determination to the Executive Branch to decide how it will comply with the WTO Appellate Body decision in light of the United States' announced intent to comply with that decision. A remand is thus an essential step in allowing the United States to implement fully the required changes, thereby permitting the United States to comply fully with its international obligations.

When addressing this issue in other cases, the Commerce Department has advanced the position that it possesses no legal authority to change its underlying antidumping administrative review determination because re-determinations made pursuant to Section 129 of the Uruguay Round Agreements

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tion in this case or imposition of higher dumping duties after liquidation if [plaintiff] is successful on the merits. Once liquidation occurs, a subsequent decision by the trial court on the merits of [a] challenge can have no effect on the dumping duties assessed on entries. . . ."). *See also Frontier Ins. Co. v. United States*, 276 F. Supp. 2d 1334, 1342 (Ct. Int'l Trade 2003) ("Customs liquidation of duties is essentially an irrevocable act. Hence, [once liquidated,] all the retroactive relief that the [Commerce Department] could grant [is] with respect to...unliquidated entries.") (citations omitted); *Daewoo Elec. Co., Ltd. v. United States*, 760 F. Supp. 200, 208 (Ct. Int'l Trade 1991) (citing *Zenith*, the Commerce Department taking the position that, except for the "errors not pointed out in [a court's] remand decision," it is "prohibited from making changes in the final result without the express authorization of the [courts]."); *Leather from Argentina, Wool from Argentina, Oil Country Tubular Goods from Argentina, and Carbon Steel Cold-Rolled Flat Products from Argentina*, 62 Fed. Reg. 41361 (Dep't Commerce Aug. 1, 1997) (final results of changed circumstances countervailing duty review) (accompanying decision and issues memorandum at comment 4) (citing *Zenith*, the Commerce Department limiting its post-determination antidumping duty adjustments to *unliquidated* entries because the agency" no longer has jurisdiction over liquidated entries and cannot amend its liquidation instructions").

Indeed, this is why the Court of International Trade issued an injunction, in this very case, to prevent liquidation of these import entries pending final resolution of the court litigation. By its express terms, however, the injunction against liquidation ends after conclusion of court litigation.

Act (a statutory mechanism that allows the Commerce Department to comply with a WTO Appellate Body decision, *see* 19 U.S.C. § 3538(c)(1) (2007)) affect only entries made after a USTR determination to comply with the WTO Appellate Body decision. This position misunderstands Petitioners' arguments. Petitioners do not seek a Commerce Department Section 129 determination. Rather, they seek a "re-determination pursuant to court remand." There is no question that the Commerce Department possesses the authority to amend its underlying antidumping determination if the Court orders a re-determination.

Importantly, once the review is remanded, the Commerce Department may rely on various legal mechanisms to reverse its zeroing practice in the review at issue to comply with its WTO obligations. In other words, the Commerce Department's legal basis for implementation is not limited to Section 129 of the Uruguay Round Agreements Act. As acknowledged by the United States itself, other legal bases exist for the Commerce Department to comply with WTO Appellate Body decisions, including those allowing implementation to cover the unliquidated entries at issue in this case. *See United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, Report of the Panel, WT/DS221/R, at paras. 3.78-3.79 (July 15, 2002). For instance, the United States has stated that implementation may be based on the Commerce Department's authority to alter the interpretation of statutes that the agency is entrusted to administer. *Id.* at para. 3.79 n.31. Likewise, according to the United States, the *Charming Betsy*[12] doctrine "might [also] be relied upon by the Department of Commerce as a reasonable explanation for a change in its methodology." *Id.* at para. 3.79 n.32. Thus, upon remand, the Commerce Department is fully able to modify its review determination.

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[12] The *Charming Betsy* doctrine is discussed in Section II, *infra*.

The United States cannot honor its commitment to Japan and simultaneously persist in its policy of not revising the underlying antidumping determination at issue. This case should be remanded so the Executive Branch can consider this conflict, and make a decision in this particular case.

II. THE FEDERAL CIRCUIT SHOULD HAVE REMANDED THIS CASE TO ALLOW THE EXECUTIVE BRANCH TO CONSIDER AND EXPRESSLY ADDRESS IMPORTANT U.S. INTERNATIONAL LEGAL OBLIGATIONS.

As discussed above, the United States made specific representations that it would bring U.S. antidumping practice into compliance with U.S. international legal obligations. Yet, the Federal Circuit's decision in this case, which refuses to grant a remand without any explanation at all, threatens to ignore those representations. This refusal means that the Judicial Branch has essentially stripped the Executive Branch of its ability and obligation to address this issue in the first instance. This approach runs afoul of several important principles.

First, U.S. international obligations should not be lightly dismissed. The importance of those obligations is reflected in the time-honored doctrine established by this Court in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), where Chief Justice Marshall stated:

> [T]hat an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate neutral rights, *or to affect neutral commerce*, further than is warranted by the law of nations as understood in this country.

See also F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. . . . This rule of

construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."). This interpretative principle reflects the sound policy that agencies and courts should not create breaches of U.S. international obligations where avoidable. Contrary to this sound policy, the Federal Circuit gave short thrift to U.S. international legal obligations without giving any rationale for doing so.

Second, when underlying U.S. international obligations have changed or been clarified, it is important to allow these changes to be fully considered. In an analogous situation, this Court stated that "a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance" how to apply the change. *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 n.10 (1974). This approach is logical, given that the courts should not try to anticipate what the agency will say. Rather, they should remand to allow the agency to address the specific facts and changes at issue. In this particular case, several important Appellate Body rulings have clarified and confirmed exactly what the United States' international legal obligations require.[13] Some

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[13] *See United States—Anti-Dumping Measure on Shrimp from Ecuador*, Report of the Panel, WT/DS335/R, at paras. 7.43, 8.1 (Jan. 30, 2007) (finding the Commerce Department's zeroing practice inconsistent with the WTO Antidumping Agreement as applied to the investigation at issue; ruling issued after *U.S.—Zeroing*, thereby confirming the line of decisions holding zeroing inconsistent with the WTO Antidumping Agreement); *U.S.—Zeroing*, WT/DS322/AB/R, at para. 190 (Jan. 9, 2007) (finding the Commerce Department's zeroing practice facially inconsistent when used in administrative reviews and in investigations); *United States—Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, Report of the Appellate Body, WT/ DS294/AB/R, at paras. 133, 263(a)(i) (April 18, 2006) (finding the Commerce Department's zeroing practice inconsistent as applied to the reviews at issue); *United States—Final Dumping Determination on Softwood Lumber from Canada*, Report of the Appellate Body, WT/ DS264/AB/R, at para. 183(a) (Aug. 11, 2004)

of these rulings took place *after* prior Federal Circuit decisions on this issue, *see Corus Staal BV v. Dep't of Commerce,* 395 F.3d 1343, 1349 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006); *The Timken Co. v. United States,* 354 F.3d 1334, 1344-45 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 976 (2004), and some are subject to ongoing efforts by the Executive Branch to bring U.S. law and practice into compliance. Rather than pause and remand the case to allow these important changing circumstances to be addressed, the Federal Circuit simply ignored these changes without any explanation.

Third, although agency interpretations are entitled to deference, those interpretations must reflect a reasonable and permissible construction of the statute. As this Court explained in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when Congress has not spoken to an issue:

> [T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

To be permissible, reasonable, and worthy of deference under *Chevron*, the agency interpretation or decision must reflect the sound policy of *Charming Betsy*, and have taken into account the most recent developments relating to U.S. international legal obligations.

In this case, these various principles do not conflict but rather all point consistently to a single conclusion: this case should have been remanded back to the agency. Indeed, in the commentary that addresses this very factual situation, the

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(finding that Commerce's zeroing practice is facially inconsistent in investigations).

Chief Judge of the Court of International Trade distilled these principles into a clear and sensible approach: "If an intervening WTO decision has occurred that conflicts with the agency decision, the reviewing court probably should consider remand of the case to the agency for consideration of the WTO decision, which may moot the potential conflict." Jane A. Restani & Ira Bloom, *Essay: Interpreting Int'l Trade Statutes: Is the* Charming Betsy *Sinking?*, 24 Fordham Int'l L.J. 1533, 1545 (June 2001).

This case reflects issues of great importance to the Government of Japan and other U.S. trading partners, who care deeply about whether the U.S. antidumping law will be administered in ways consistent with U.S. international obligations and whether the United States will respect and give full effect to decisions rendered pursuant to the WTO dispute settlement mechanism. Judicial inaction should not be allowed to trump the announced intentions of the Executive Branch to administer the antidumping law consistent with U.S. international obligations, and to respect the WTO dispute settlement mechanism.

For these reasons, we support Petitioners in this case and urge this Court to grant a writ of certiorari to allow the Executive Branch to fully consider these issues.

CONCLUSION

Based on the foregoing, amicus curiae Government of Japan respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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